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No. 80-273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., ET AL.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 9 of the Rivers and Harbors Act of 1899, which requires specific congressional consent for the construction of "any . . . dike . . . over or in any . . . navigable water of the United States," applies to the construction of a dike for the disposal of dredgings in the waters of Chesapeake Bay?

2. Whether speculation concerning legislative intent and evidence of sporadic administrative actions can expand the jurisdiction of the Corps of Engineers to authorize obstructions to navigation beyond the clear limitations of Section 9 of the Rivers and Harbors Act of 1899?

PARTIES TO THE PROCEEDING BELOW

The plaintiffs below were Hart and Miller Islands Area Environmental Group, Inc., a Maryland corporation; The Honorable Clarence Long, M.C.; The Honorable Norman R. Stone, a member of the Senate of Maryland; Maryland Wildlife Federation, Inc., a Maryland corporation; John Henderson; Howard Sappington (now deceased); George Wohlleben; Robert Scott; Margaret Caldwell; and Charles Justice.

The defendants were the United States Army Corps of Engineers; The Honorable Clifford L. Alexander, Secretary of the Army; Lt. Gen. John W. Morris, Chief of Engineers of the United States Army; and Col. G. K. Withers, District Engineer, Baltimore District, United States Army Corps of Engineers.

Intervening defendants were the State of Maryland, ex rel., Stephen H. Sachs, Attorney General; and the Steamship Trade Association of Baltimore, Inc., a Maryland corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. 1) is not yet reported. The opinion of the District Court (App. 23) is reported at 459 F. Supp. 279. The supplementary opinion of the District Court denying reconsideration (App. 47) is unreported.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on May 28, 1980. No petition for rehearing was filed. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 9 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. § 401 (hereinafter the "Act"), provides in pertinent part:

> "It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any . . . navigable water of the United States until the consent of Congress to the building of such structure shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army . . . ."

Section 10 of the Act, 33 U.S.C. § 403, provides in pertinent part:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill [in a navigable waterway of the United States] . . . unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

The full text of these sections, together with the text of certain relevant predecessor statutes, appears in the Appendix.

STATEMENT OF THE CASE

1. Introductory Statement

This case presents a question which this Court chose not to resolve in *Citizens Committee for the Hudson Valley*

v. *Volpe*, 425 F.2d 97 (2d Cir.), *cert. denied sub nomine Parker* v. *Citizens Committee for the Hudson Valley*, 400 U.S. 949 (1970) (Harlan, White and Blackmun, JJ., dissenting from denial of *certiorari*) (hereinafter referred to as *Hudson Valley*). The question concerns the respective coverage of Sections 9 and 10 of the Rivers and Harbors Act of 1899. Section 9 of that Act requires the consent of Congress and the Army Corps of Engineers ("Corps") for construction of certain types of structures in or over navigable waters of the United States which touch more than one state, including "any bridge, dam, dike or causeway over or in any" such waters. Section 10 requires only Corps of Engineers approval (delegated from the Secretary) for other, generally smaller structures in such navigable waters —wharves, piers, etc.

In *Hudson Valley* the District Court and the Court of Appeals for the Second Circuit held that the term "any . . . dike . . . over or in" navigable waters applies to all structures which meet the commonly accepted definition of "dike," rejecting arguments by the Corps for a narrower interpretation of Section 9 which would have included some but not all dikes. 302 F. Supp. 1083, 1088-89; 425 F.2d at 106. The Solicitor General of the United States and the Attorney General of the State of New York sought *certiorari* on the ground that the proper interpretation of Section 9 presented an important question worthy of this Court's consideration.[1] However, only three Justices agreed, and the Second Circuit's decision was allowed to stand. Since that time, the District Courts have reached varying conclusions upon this issue (*see* Section I, *infra*).

The instant case presents the same issue. The District Court below followed *Hudson Valley* and the plain meaning of the statute, but the Court of Appeals reversed, rejecting the *Hudson Valley* holding on the basis of novel

[1] The State of New York also sought *certiorari* on the question of plaintiffs' standing, but the Solicitor General did not.

(and we submit erroneous) readings of the legislative history and the Corps' prior administrative practices. Thus, the instant petition presents this Court with an opportunity to resolve this important federal question which has now engendered a divergence of opinion among the Circuits.

2. Factual Background

In 1970 Congress authorized dredging to deepen the Baltimore Harbor Channel to a depth of 50 feet.[2] As a condition to commencement of the dredging, the State of Maryland agreed to provide a site for disposal of the dredgings, much of which would be highly toxic. To meet this condition, the State of Maryland applied to the Army Corps of Engineers on February 23, 1972, for a permit to construct a two-square-mile diked containment area adjacent to Hart and Miller Islands in the Chesapeake Bay.[3] This structure is intended to be used for the disposal of approximately 52,000,000 cubic yards of dredged spoil. After public hearings and consideration of an environmental impact statement, the Corps issued the permit on November 22, 1976. The Corps did not seek the consent of Congress for construction of the containment area, in part because of the Corps' perception of the "political realities of the situation," which included the opposition of the local Congressman. (Court of Appeals App. 421.)

The permit, as authorized by the Secretary of the Army and issued by the Corps of Engineers, allowed the State "to construct a Diked Disposal Area to Contain Dredged Materials . . . on approximately one thousand one hundred (1,100) acres adjacent to Hart and Miller Islands." In fact, the diked disposal area would obliterate fifty percent of Miller Island and ten percent of Hart Island.

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[2] Rivers and Harbors Act of 1970, Pub. L. No. 91-611, § 101, 84 Stat. 1818 (1970).

[3] Hart and Miller Islands contain beaches and wetlands, and are used primarily for recreational purposes (App. 5).

3. The Statutory Scheme

This action arises under a statutory scheme established by Congress eighty-one years ago to oversee the reasonableness of obstructions to navigation in the waters of the United States. Under the Commerce Clause of the Constitution, Art. I, Sec. 8, Cl. 3, Congress has power to regulate all obstructions to navigation,[4] but Congress did not begin to exercise its authority until the 1880s.[5] In the absence of such regulation the states asserted their residual powers over commerce.[6]

In 1890 Congress enacted the first general legislation subjecting obstructions in navigable waters to federal scrutiny. Section 7 of the Rivers and Harbors Act of 1890, 26 Stat. 454, prohibited the construction of wharves, piers, dolphins, booms, dams, weirs, breakwaters, bulkheads, jetties, and "structures of any kind" outside established harbor lines without permission from the Secretary of War.[7] Section 7 also permitted construction, pursuant to state legislative authority, of bridges, bridge draws, bridge piers and abutments, causeways, and "other works" over or in navigable waters of the United States, provided the plans were later approved by the Secretary of War.[8] In other words, the approval of the Secretary of War was a necessary but not sufficient requirement for construction of structures falling into this second grouping (bridges, causeways, etc.), since state approval was also required.

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[4] *See, e.g., Pound* v. *Turck*, 95 U.S. 459 (1877); *Cardwell* v. *American Bridge Co.*, 113 U.S. 205 (1885).

[5] *See, e.g.*, Rivers and Harbors Act of 1888, § 9, 25 Stat. 424-25; Rivers and Harbors Act of 1884, §§ 2, 8, 23 Stat. 133, 147, 148-49.

[6] *See, e.g., Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1 (1887).

[7] This language is the predecessor of § 10, cl. 2 of the 1899 Act. *See infra*, p .6.

[8] This language is the predecessor of § 9 of the 1899 Act. *See infra*, p. 6.

State authorization powers were further curtailed by a proviso to Section 7 which expressly limited them to structures over or in navigable waters wholly within the limits of a state. This proviso effectively required Congressional authorization for all bridges over or in navigable waters touching more than one state. 20 Op. A.G. 488, 491-92 (1892); *see* 21 Op. A.G. 41, 43-44 (1894).

Congress modified the 1890 legislation nine years later when it passed the Act under which this litigation arises, the Rivers and Harbors Act of 1899, 30 Stat. 1121, 33 U.S.C. § 401 *et seq.* One change made by the 1899 Act directly affects proper resolution of this action. Section 7 of the 1890 Act had distinguished between one category of structures—wharves, piers, dolphins, booms, dams, and jetties—and another that included bridges, bridge draws, bridge piers and abutments, and causeways. Authority to permit construction of the former lay with the Secretary of War, whereas authority to permit construction of the latter required the concurrence of either a state legislature or Congress. The successor provisions of the 1899 Act excluded dams from the first category of structures, *see* § 10, cl. 2, and added dams and *dikes* to the second, *see* § 9. In addition, the 1899 Act also clarified the requirement of express congressional consent for construction of certain structures falling within the second category. Thus, "any dike" constructed outside a harbor and over or in a navigable waterway touching more than one state had to be authorized by Congress, rather than merely by one or more states.

Having asserted the power of federal review over all structures affecting navigation, Congress delegated away much of that authority in order to avoid overburdening itself. The Secretary of War (now the Secretary of the Army) rules on the proposed obstructions to navigation enumerated in Section 10—wharves, piers, etc.[9] *See Wis-*

[9] This authority has been redelegated to the Corps of Engineers. 33 C.F.R. § 325.8 (1977); 33 C.F.R. § 322, App. B (1977).

consin v. *Illinois*, 287 U.S. 367, 413 (1929). In addition, the states, subject to further approval by the Corps, authorize construction of bridges, dams, dikes and causeways in or over navigable waterways wholly within a state, But Congress carefully reserved to itself the authority to approve or disapprove bridges, dams, dikes, or causeways situated in or over navigable waterways touching more than one state. This statutory reservation of authority stands unmodified in any pertinent way today.[10]

4. The District Court Proceedings

On June 30, 1977, this suit was brought in the United States District Court for the District of Maryland, challenging various actions of the Corps of Engineers in connection with the Hart and Miller Islands diked disposal project.[11] The plaintiffs included, among others, a local citizens' group, U.S. Congressman Clarence Long, and State Senator Norman Stone. Both legislators represent districts which include Hart and Miller Islands. Plaintiffs opposed construction of the disposal facility in question on environmental, safety, and aesthetic grounds. They sought, *inter alia*, a declaration that the action of the Corps in issuing the permit was unlawful and void for lack of consent of Congress, as required by Section 9 of the Act.[12]

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[10] Apart from the delegations within the 1899 Act, Congress has also empowered the Coast Guard (successor to the Secretary of the Army) and the Federal Energy Regulatory Commission (successor to the Federal Power Commission) to authorize bridge and dam construction across or in navigable waterways in certain circumstances. *See* 33 U.S.C. §§ 525, 530 (General Bridge Act) and 16 U.S.C. §§ 797(e), 817 (Federal Power Act).

[11] The District Court had jurisdiction over the matter pursuant to 28 U.S.C. § 1331(a).

[12] It is undisputed that the Chesapeake Bay is a navigable body of water and that the navigable portions of the Bay do not lie wholly within one state (App. 29).

Cross-motions for summary judgment were filed, and the District Court (Murray, J.) granted summary judgment to the plaintiffs, declaring that the Corps of Engineers had exceeded its authority by issuing the permit without having obtained the consent of Congress. 459 F. Supp. 279 (D. Md. 1978) (App. 59-60). In resolving the question of the scope of Section 9, the District Court analyzed the reported case law, the history of Sections 9 and 10, and the Corps' past administrative practice with respect to the application of those provisions. It concluded that it must decide whether the proposed structure is a dike by applying the ordinary meaning of that term, thus following the Second Circuit's decision in *Hudson Valley.*

The Corps had argued that "dike" in Section 9 referred only to structures which completely span a navigable waterway, but the District Court disagreed. Aside from the fact that the commonly accepted definition of "dike" did not include such a limitation, the Court noted that Section 9 explicitly covered "any dike . . . over *or in* any . . . navigable water" (App. 44), and that the language "over or in" was precisely contrary to the Corps' interpretation. The Court also relied upon the fact that the Corps' own materials concerning this Chesapeake Bay project repeatedly referred to it as a dike (App. 39-40).

The District Court refused to defer to the Corps' alleged longstanding administrative interpretation of "dikes" as structures which span waterways. It pointed out that such a definition was at odds with the statutory language and noted that such self-serving statements could not extend, in "bootstrap" fashion, the Corps' statutorily confined jurisdiction. (App. 43; *see also* App. 48-49 (on rehearing)). Finally, the Court rejected the Corps' contention that Congress had tacitly ratified the agency's interpretation by various pieces of recent legislation, finding no basis for such a claim. In fact, the Court pointed out that Congress had recently specifically exempted certain proposed diked

disposal areas in the Great Lakes from the application of Section 9 by the very legislation which authorized the Baltimore harbor dredging. *See* Rivers and Harbors Act of 1970, Pub. L. No. 91-611, § 123, 84 Stat. 1818, 1823 (1970). The District Court concluded from that evidence that Congress understood Section 9 to apply to dikes which do not completely span a waterway and that Congressional consent is required for their construction unless they are explicitly exempted by statute, as were the Great Lakes facilities.

Having so interpreted Section 9, the District Court ruled that the structure was a dike, concluded that the Corps had exceeded its jurisdiction, and held that the permit was of no force without the approval of Congress. Judgment was entered for plaintiffs.

Defendants and intervenors moved for rehearing by the District Court, relying principally upon the Corps' administrative interpretation of Section 9. After careful consideration, the District Court denied the motion by written opinion of November 22, 1978 (App. 47). The Court noted again that the Corps' interpretation was inconsistent with the plain language of the statute, and that deference to that interpretation would permit the Corps to obtain for itself authority which Congress had chosen not to give it (App. 52).

5. The Court of Appeals Proceedings

All defendants and intervenors timely appealed to the United States Court of Appeals for the Fourth Circuit.[13] While the matter was pending on appeal, congressional approval for the project was sought, but could not be obtained.

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[13] The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

On May 28, 1980, the Court of Appeals (Widener and Hall, JJ., and Warriner, D.J.) reversed, finding that Section 9 of the Act did not apply to the project in question. The Court adopted the Corps' contention that Section 9 applied only to dikes which entirely traverse a navigable body of water.

Unlike the District Court, the Court of Appeals did not apply the plain meaning of the term "dike," because it found that Section 9 of the Act was ambiguous (App. 7, 11). It drew that conclusion from this Court's statement in *Wisconsin* v. *Illinois, supra,* 287 U.S. at 413, that the interrelationship of various segments of Section 10 of the Act was somewhat ambiguous. The Court of Appeals suggested that such ambiguity "probably" applied to Section 9 as well.

Given this supposed ambiguity in statutory language, the Court of Appeals then focused upon a variety of materials which the Corps tendered and characterized as legislative history and administrative practice. After demonstrating the derivation of the 1899 Act from the 1890 Act, the Court focused on the changes, noted above. It accepted without question and without documentation the Corps' assertion that the congressional consent requirement of Section 9 "may well have been intended" to overcome broad *dicta* in *United States* v. *Keokuk & H. Bridge Co.,* 45 F. 178 (S.D. Iowa 1890), and *United States* v. *Rider,* 50 F. 406 (S.D. Ohio 1891), to the effect that Congress could not constitutionally delegate its authority to determine when and where bridges should be built over the navigable waters of the country (App. 15). This undisclosed purpose was viewed by the Fourth Circuit as a better guide to the meaning of the statutory changes than the language employed by Congress.

The Fourth Circuit also examined miscellaneous evidence proffered by the Corps concerning its administrative practice—a 1926 Corps lecture, the Secretary of War's con-

gressional testimony in 1916, and two affidavits from Corps employees. However, apparently recognizing the sporadic and self-serving nature of the Corps' declarations in favor of its own authority, the Court also suggested that Congress was aware of and had approved the Corps' practices during hearings on the Federal Water Pollution Control Act Amendments of 1972.[14]

In sum, the Court accepted the Corps' proposed interpretation of Section 9, finding it to be "perfectly reasonable" (App. 15), and "clear, convenient, and workable" (App. 20).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With A Decision Of The Second Circuit, And This Court Should Resolve This Conflict On An Important Question Of Federal Law

In *Citizens Committee for the Hudson Valley* v. *Volpe, supra,* 425 F.2d 97, the Second Circuit held invalid a permit granted by the Secretary of the Army for the construction of a four-and-one-half-mile-long dike adjacent and parallel to the eastern shore of the Hudson River. The Court held that the structure in question was a "dike" within the meaning of Section 9 of the Rivers and Harbors Act of 1899, and therefore could not be built without congressional approval.

In *Hudson Valley,* the District Court and the Court of Appeals, after "carefully review[ing] the pertinent evidence and consider[ing] the governing rules of statutory construction," and after consulting technical dictionary definitions included in the record, rejected the Govern-

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[14] In fact, as noted above and as found by the District Court, Congress' actions in specifically exempting certain diked disposal projects in the Great Lakes from the scope of Section 9 suggest precisely the opposite—that Section 9 applies to such dike projects absent an express exemption.

ment's position that not all dikes are governed by Section 9. 302 F. Supp. at 1088-89; 425 F.2d at 106. The District Court and the Second Circuit applied the basic principle of statutory interpretation that statutes should be interpreted according to their plain meaning or common significance.[15] In addition, the Court found no legislative or judicial authority to support the Corps' contrary position. 302 F. Supp. at 1089.

The United States and the State of New York petitioned for *certiorari* to review the Second Circuit's decision, but review was denied, Justices Harlan, White and Blackmun dissenting. 400 U.S. 949 (1970).

In this case, the Fourth Circuit adopted an entirely different approach and reached the opposite result. Unlike the Second Circuit, which relied on the plain meaning of "any dike," the Fourth Circuit found that term ambiguous. As noted above, the Fourth Circuit then proceeded to find meaning in various legislative and administrative materials, and to conclude from them that "any dike" really means "some dikes," precisely the conclusion rejected by the Second Circuit.

The direct conflict between the Circuits is easily illustrated by the fact that if the instant case were decided under the principles of *Hudson Valley* (as it was in the District Court), plaintiffs would prevail, since the structure in question is concededly within the commonly accepted meaning of a dike and is consistently described by the Corps as a dike in the materials underlying the permit. Conversely, the *Hudson Valley* case would undoubtedly have come to the opposite result if decided under the principles set out by the Fourth Circuit herein, since the dike at issue there did not span the Hudson River.

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[15] This principle has recently been reaffirmed in *Maine* v. *Thiboutot*, —— U.S. —— (1980), No. 79-838, slip op. 3, 48 U.S.L.W. 4859 (June 25, 1980), and *S.E.C.* v. *Sloan*, 436 U.S. 103, 111-12 (1978).

In short, the conflict between the Circuits is extensive and fundamental, and if not resolved promptly by this Court, will engender conflicting decisions in the lower courts. In fact, this has already been occurring in the District Courts. For example, in *Sierra Club* v. *Morton*, 400 F. Supp. 610, 626-27 (N.D. Cal. 1975), *aff'd in part, rev'd in part*, 610 F.2d 581 (9th Cir. 1979), *cert. pending sub nomine, State of California* v. *Sierra Club* (No. 79-1252, filed Feb. 13, 1980); *Kern County Water Agency* v. *Sierra Club* (No. 79-1502, filed Mar. 17, 1980); and *Sierra Club* v. *Andrus* (No. 79-1625, filed Apr. 16, 1980), the District Court adopted the reasoning of *Hudson Valley* and applied the ordinary meaning of the words "dike" and "dam" in finding certain structures to be subject to Section 9.[16] However, in *Petterson* v. *Resor*, 331 F. Supp. 1302 (D. Ore. 1971), the District Court declined to follow *Hudson Valley* and held that the term "dike" in Section 9 was narrower than its commonly accepted meaning. An appeal to the Ninth Circuit ensued, but the project was cancelled during the pendency of the appeal, and the Ninth Circuit thereupon vacated the decision below as moot. 494 F.2d 124 (9th Cir. 1974). In *Citizens Committee for Environmental Protection* v. *United States Coast Guard*, 456 F. Supp. 101 (D.N.J. 1978), the Court accepted the reasoning of *Petterson* and rejected *Hudson Valley* in finding that only those dikes which constitute an "unreasonable obstruction" to navigation are "dikes" for purposes of Section 9. Finally, of course, in the instant case, the District Court followed *Hudson Valley*, while the Court of Appeals

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[16] The Section 9 issue has not survived to the Supreme Court level in these cases and will not be before this Court if it grants *certiorari* therein. Nevertheless, No. 79-1252 presents an important issue concerning the relationship between Section 10 of the Act and state law. The Court may wish to consider accepting both that case and this one to determine the precise relationship between the various requirements for congressional, executive, and state approval of obstructions to navigation set out in Sections 9 and 10.

accepted the contrary interpretation of Section 9 presented in *Petterson.*

Without the intercession of this Court, the federal courts will doubtless continue to disagree upon the meaning of Section 9. Furthermore, the issue is now, after ten years of percolation in the lower courts, clearly ripe for this Court's review. Ten years ago when the Solicitor General petitioned for *certiorari* in *Hudson Valley,* he relied solely upon the substantiality of the question presented herein. Now that a conflict between the Circuits has developed, there should be no doubt as to the propriety of granting the writ.

II. This Case Presents An Important Question Of Federal Law Which Has Not Been, But Should Be, Resolved By This Court

This case presents an important question of federal law for two reasons. First, the project at issue is one of many which are being and will be undertaken nationwide, involving many millions of dollars, and potentially presenting the same issue. Second, the decision below may well cause numerous such projects to be begun, only to be discontinued later when this Court or another Court of Appeals rules that Congressional approval was in fact required, thus causing a substantial waste of federal and state funds.

A. There are and will continue to be numerous projects raising this issue

While the effect of the massive dike at issue herein would be quite substantial with regard to the Chesapeake Bay Region alone, the legal question presented has far broader implications. The proposed Hart and Miller Islands disposal facility represents but one of many similar diked disposal projects across the country. In fiscal 1979, the Corps of Engineers expended $324,000,000 to remove 282,000,000 cubic yards of dredged materials from the system of navigable waterways which includes 25,000

miles of waterways and 500 harbors; over the last decade, the Corps has expended well over three billion dollars on such projects.[17] In order to dispose of this enormous quantity of dredged material, the Corps has designed and authorized the construction of many diked disposal sites nationwide.[18]

Additionally, the question presented herein will assume increasing importance in the coming decades, as both federal and state governments have recently imposed stringent restrictions on open water disposal of polluted dredged materials. *See* Court of Appeals Opinion, App. 5 n.5, 17 n.10, 19. For example, one of the stated objectives of Section 404 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, is to control open water disposal of dredged materials. *See* 118 Cong. Rec. 33699 (1972) (remarks of Sen. Muskie).

Further, the 1977 amendments to the Clean Water Act, Pub. L. No. 95-217, 91 Stat. 1566, 1577-78 (1977), have strengthened this policy by adding a new subsection (t) to Section 404, requiring that future federal dredging activities be consistent with state water quality regulations. In many states these regulations require confined disposal of dredged material. *See, e.g., Md. Ann. Code,* § 8-1602 (1979 Supp.); *N.C. Gen. Stat.* § 113-229(i) (1978); *Fla. Stat. Ann.* § 403.813(2)(f)(West 1980).[19]

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[17] Water Resources Support Center, U.S. Army Corps of Engineers, "Summary of Activities" (April 9, 1980).

[18] Office of Dredged Material Research, U.S. Army Corps of Engineers, "Practices and Problems in the Containment of Dredged Materials in Corps of Engineer Projects" Table 3, Appendix D (1974).

[19] Other indications of the evolving federal policy in favor of confined disposal of dredged material appear in the Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, 86 Stat. 1052 (1972) (codified at 33 U.S.C. § 1401(b)), and in the Senate's ratification of the Convention on the Prevention of Marine

As a consequence of these legislative actions, use of confined disposal facilities like the Hart and Miller Islands project is expanding significantly, and the legal question whether such structures fall within Section 9 or 10 of the Rivers and Harbors Act is becoming even more significant.

Moreover, the import of the term "dike" in Section 9 also has significance apart from the movement toward contained disposal of dredgings. *Hudson Valley* involved a dike to retain fill for a road; *Petterson* dealt with an airport runway extension; and *Citizens Committee for Environmental Protection* v. *United States Coast Guard, supra,* concerned placement of fill behind retaining walls for a highway extension. Other projects where the Corps has issued permits for "dikes" have involved the creation of parks and recreational areas, railroad embankments, and the enlargement of forts.[20]

B. The erroneous decision below may cause the waste of millions of dollars

The decision below is plainly wrong. Permitting it to go unreviewed at this time may well waste millions of dollars of federal and state funds. The Corps will undoubtedly be emboldened by this decision, and will consistently process permits for similar dikes without Congressional approval. Moreover, even in those cases where environmental groups, citizens or individual congressmen have the interest and wherewithall to challenge such actions, District Courts may initially be swayed by the Fourth Circuit's decision herein, with its veneer of careful legislative and administrative analysis. While we are confident that Section 9 will ulti-

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Pollution by Dumping of Wastes and Other Matter. 119 Cong. Rec. 28012 (1973).

[20] *See Parker* v. *Citizens Committee for the Hudson Valley,* Reply Brief in Support of Certiorari 7-8 (No. 614, October Term, 1970).

mately be interpreted correctly by this Court and the other Courts of Appeal, awaiting that eventuality, which will stop projects like the instant one in midstream, will be exceedingly costly and inefficient.[21]

The Fourth Circuit erred in interpreting Section 9 of the Act by failing to abide by the principles of statutory construction reiterated by this Court on numerous occasions. As illustrated above, the plain meaning of the term "dike," buttressed by various dictionary definitions and by the consistent use of that term by the Corps to describe this very project, indicates that the structure at issue is a "dike" for purposes of Section 9. Congress' additional language—that such dikes may be "over *or in*" navigable waterways—confirms this conclusion, and illustrates the impropriety of any contention that Section 9 dikes must completely span a waterway.

The Court of Appeals, however, concluded that dikes which do not entirely span a body of water are not dikes for this purpose. Under this approach, a dike (in the common sense of the word) which blocked 90 percent of the width of the Mississippi River would not be a dike for purposes of Section 9, and its construction would not require congressional approval. However, construction of a bridge across the Mississippi (which might well obstruct navigation to a far lesser extent) would require congressional approval. The basis for this illogical conclusion was an uncritical, virtually verbatim adoption of the Corps' arguments based upon what it called legislative and administrative history. However, these arguments are fatally flawed in numerous ways.

First, in order to avoid applying the plain meaning of the term "dike," the Court of Appeals accepted the Corps' invitation to find the term ambiguous. As noted above, this

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[21] *See TVA* v. *Hill*, 437 U.S. 153 (1978); *Hudson Valley*, *supra*, 425 F.2d at 105.

supposed ambiguity derived from the Fourth Circuit's reading of *Wisconsin* v. *Illinois, supra,* 268 U.S. at 413, a case dealing not with Section 9, but with the interrelationships of the three clauses in Section 10. Because this Court found those relationships ambiguous, the Fourth Circuit concluded that the holding "probably" covered "Section 9 as well" (App. 7).

Having found Section 9 ambiguous, the Court of Appeals proceeded to examine its legislative history. However, rather than relying upon anything that was said at the time concerning Congress' intentions, the Court adopted the Corps' speculation that the congressional consent requirement in Section 9 may have been attributable to certain *dicta* in *United States* v. *Keokuk & H. Bridge Co., supra,* and *United States* v. *Rider, supra.* The Court of Appeals reasoned that since those cases "limited Congressional power to delegate authority over two structures that completely spanned navigable rivers . . . Section 9 *may well have been* intended to require Congressional approval only where agency approval would have been an unconstitutional delegation of legislative power, *i.e.,* for [structures] that completely span navigable waterways." (App. 15) (emphasis added).

Not only was this speculation unnecessary since Congress did not *add* the congressional consent requirement in 1899, *see* p. 6 *supra,* but it is also unconvincing for several reasons. First, there is no indication whatsoever that Congress was aware of these decisions or was taking cognizance of them in amending the Act. Second, these *dicta* were rejected before passage of the 1899 Act and thus were not even prevailing law at the time.[22] Third, *Keokuk* and *Rider* do not even stand for the suggested proposition, but instead for the narrower proposition that Congress may not delegate to the executive the authority to order alterations in bridges previously authorized by Congress.

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[22] 21 Op. A.G. 430, 436 (1896); *United States* v. *City of Moline,* 82 F. 592 (N.D. Ill. 1897).

In any event, such pure speculation about legislative intent is clearly inappropriate. *Maine* v. *Thiboutot, supra,* —— U.S. ——, slip. op. 5-7; *United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533, 556-58 (1944).[23]

The Fourth Circuit then proceeded to buttress this "legislative history" with purported administrative practice. Considering such materials as a 1926 lecture, isolated Congressional testimony in 1916, a Corps regulation promulgated after the commencement of this lawsuit and an affidavit filed in connection with another case, the Court found evidence of a consistent administrative practice "of over eighty years." (App. 17). This paltry material, however, simply does not demonstrate a long-standing administrative interpretation sufficiently weighty to overcome the clear statutory language to the contrary.[24]

Moreover, the Corps' reliance on its allegedly consistent administrative practice does not serve as a defense to the claim that it exceeded its jurisdiction when it issued the permit in question. In the words of this Court, the proposition that the construction of a statute by the agency

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[23] If the Court truly wished to determine congressional intent, it could have examined the contemporaneous usage of the term "dike" by Congress. In both the 1890 and 1894 River and Harbors Acts, Congress prohibited certain actions which would impair or injure any "seawall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States in whole or part, for the preservation and improvement of any of its navigable waters, or to prevent floods . . . ." Rivers and Harbors Act of 1894, § 6, 27 Stat. 363; Rivers and Harbors Act of 1890, § 9, 26 Stat. 454. In this context Congress clearly envisioned dikes in or along and not necessarily across navigable waterways. *See also Gibson* v. *United States,* 166 U.S. 269 (1897) ("dike" in Ohio River).

[24] The lecture and congressional testimony relied upon are clearly not the type of evidence necessary to demonstrate a consistent administrative practice. The affidavits also miss the mark since they primarily demonstrate Corps approval of dikes within harbor lines, or in bodies of navigable water which touch only one state, both of which are outside the explicit language of the first clause of Section 9.

charged with its administration should be given great weight

> "must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

See S.E.C. v. *Sloan*, 436 U.S. 103, 118-19 (1978); *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978).

Finally, the Fourth Circuit attempted to legitimate the tenuous evidence of administrative practice with the argument that, as a result of the consideration of the Federal Water Pollution Control Act Amendments of 1972, Congress "was not only aware of, but approved and encouraged the Corps' practice." (App. 18). However, the evidence of congressional approval, or even awareness, falls far short of the standards for such a showing outlined by this Court. *See S.E.C.* v. *Sloan, supra*, 436 U.S. at 120-21.

In any event, there is no real indication that Congress was ever made aware of, much less approved, the Corps' interpretation of Section 9. The Fourth Circuit's discussion of the 1972 legislation and its history rests on the faulty assumption that references to "disposal sites" are to dikes. In fact, "disposal sites" refers to any location suited to that purpose, either on land or water. Moreover, the reference to Representative Vanik's comments (App. 18), rather than supporting the Court of Appeals' holding, demonstrates its error. As noted above, Congress expressly exempted construction of diked disposal sites in the Great Lakes from the consent requirement of Section 9.[25] Contrary to the Fourth Circuit's implication that the long list of land or diked disposal sites inserted in the Congressional Record alerted Congress to the Corps' practice un-

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[25] Rivers and Harbors Act of 1970, Pub. L. No. 91-611, §§ 101, 123, 84 Stat. 1818, 1823 (1970).

der Section 10, this episode confirms the congressional understanding that Section 9 applies to such dikes and that they must be expressly exempted from Section 9 if that is Congress' desire.

In sum, the Fourth Circuit's reliance upon these various legislative and administrative materials simply does not support its decision to ignore the plain meaning of the statute. Given the length of its opinion and its veneer of careful analysis of legislative and administrative history, however, the decision below may lead some courts to permit projects like the one at issue to proceed without Congressional consent. A ruling thereafter from this Court or another Court of Appeals, following the Second Circuit's reasoning in *Hudson Valley,* will halt those projects, thereby causing untold waste of public funds. The situation requires a definitive ruling from this Court at this time.

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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August 22, 1980

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 78-1911, 78-1912, 79-1037

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., a Maryland Corporation; HONORABLE CLARENCE LONG, M.C.; HONORABLE NORMAN R. STONE; MARYLAND WILDLIFE FEDERATION, INC., a Maryland Corporation; JOHN HENDERSON; HOWARD SAPPINGTON; GEORGE WOHLLEBEN; ROBERT SCOTT; MARGARET CALDWELL; CHARLES JUSTICE,

Appellees,

v.

THE CORPS OF ENGINEERS OF THE UNITED STATES ARMY; HONORABLE CLIFFORD L. ALEXANDER, Secretary of the Army; LT. GENERAL JOHN W. MORRIS, Chief of Engineers of the United States Army; COL. G. K. WITHERS, District Engineer, Baltimore District, United States Army Corps of Engineers,

Appellants,

and

STATE OF MARYLAND, Ex Rel, FRANCIS B. BURCH, Attorney General, Steamship Trade Association of Baltimore, Inc.,

Intervening Defendants/Appellants

OPINION

Appeals from the United States District Court for the District of Maryland, at Baltimore. Herbert F. Murray, District Judge.

Argued May 7, 1979 Decided May 28, 1980

Before WIDENER and HALL, Circuit Judges, WARRINER, District Judge*

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* United States District Court for the Eastern District of Virginia, sitting by designation.

WIDENER, Circuit Judge:

The State of Maryland applied to the U.S. Army Corps of Engineers (the Corps), in 1972, for a permit pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, to construct a diked disposal area for dredged material on and adjacent to Hart and Miller Islands in Chesapeake Bay. The purpose of the project is to provide a site for dumping material dredged from the bottom of Baltimore Harbor and its approach channels. This material will include spoil from maintenance dredging and spoil produced by the Baltimore Harbor Channel Project, which is a Corps project designed to increase the depth of Baltimore Harbor.[1]

The Corps held a public hearing on the proposal in August 1972 and completed a draft environmental impact statement in February 1973. Action on the Maryland application was delayed in order to comply with Section 404 of the Federal Water Pollution Control Act of 1972, Pub. L. 92-500, 86 Stat. 816, 844, 33 U.S.C. § 1344. A second public hearing was held in May 1975, see 459 F.Supp. 281-282, and additional written comments were received in response to circulation of the draft environmental impact statement. The Corps issued a final environmental impact statement in February 1976. The Secretary of the Army, in November 1976, acting through the Corps, issued a permit to the State of Maryland, under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Federal Water Pollution Control Act of 1972, authorizing construction of the diked disposal facility.

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[1] Congress authorized the Baltimore Harbor Channel Project with the understanding that the State of Maryland would provide a disposal area for the spoil to be produced. Rivers and Harbors Act of 1970, Pub. L. 91-611, § 101, 84 Stat. 1818; H.R. Rep. No. 1665, 91st Cong., 2d Sess. 10 (1970).

Two environmental groups and a number of individuals commenced this action against the Corps in June 1977, seeking declaratory and injunctive relief voiding the permit. The complaint alleges that the Corps lacks the authority to issue the permit under Section 10 of the Rivers and Harbors Act because the barrier to surround the fill constitutes a "dike" which requires Congressional approval under Section 9 of that act, 33 U.S.C. § 401. The State of Maryland and the Steamship Trade Association of Baltimore intervened as defendants. All parties filed cross-motions for summary judgment in May 1978. 459 F.Supp. 280.

The district court granted the plaintiffs' motion for summary judgment and denied the motions filed by the defendants. *Hart and Miller Islands Area Environmental Group, Inc. v. Corps of Engineers,* 459 F.Supp. 279 (D. Md. 1978). The court held that the Corps could not authorize construction of the disposal facility because it was a dike within the meaning of Section 9 of the Rivers and Harbors Act of 1899 and therefore required Congressional approval.

Section 9 of that statute requires the consent of Congress for the construction of "any bridge, dam, dike, or causeway over or in" any navigable water of the United States.[2] Under Section 10 of the same act the authorization

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[2] Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, now reads:

> It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided

of the Secretary of the Army is sufficient for the construction of "any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures."[3] The sole issue decided in this appeal is whether the Hart and Miller Islands diked disposal area is subject to Section 9 or Section 10 of the Rivers and Harbors Act. We hold that the structure is not a dike within the meaning of Section 9 and is governed by Section 10 of the statute. Therefore, it does not require Congressional approval. We thus approve the issuance of the permit by the Corps and reverse the district court.

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the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

[3] Section 10 of the Rivers and Harbors Act of 1899 is now 33 U.S.C. 403:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters to the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Baltimore Harbor and its nearby navigation channels have been dredged many times in the past. Dredging will continue, both to maintain existing channels and to increase the depth of the harbor and channels.[4] An estimated 100 million cubic yards of bottom sediment will be dredged from Baltimore Harbor and nearby channels in the next twenty years. Historically, the dredged material has been dumped in the open waters of Chesapeake Bay. Such open water dumping causes pollution in the vicinity of the disposal site since the dredged bottom sediment contains toxic chemicals, heavy metals, oil, grease, and other substances. The spoil material deposited by open water dumping, of course, may also damage bottom dwelling fauna.[5] The disposal area is designed to improve the water quality of Upper Chesapeake Bay by the elimination of open water dumping.

Hart and Miller Islands are privately owned, contain no permanent structures, and are used by a limited number of boaters for recreation (without the owner's permission). There are beaches and wetlands on both islands, and part of Hart Island is forested. Both islands have a serious erosion problem which has decreased the area of Hart Island from 150 acres in 1933 to 120 acres in 1967, and de-

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[4] In 1970, Congress authorized funds for the Baltimore Harbor Channel project, which will deepen the Harbor and its approach channels to a depth of fifty feet. The present depth is from thirty-nine to forty-two feet. Rivers and Harbors Act of 1970, Pub. L. 91-611, § 101, 84 Stat. 818.

[5] Open-water dumping has been the subject of continuous criticism. As a consequence, the State tells us without contradiction that in 1969 the Maryland legislature authorized the expenditure of $13,000,000 for the design and construction of one or more containment areas to act as a receptacle for spoil dredged from Baltimore Harbor and the approach channels. Recognizing the deleterious environmental effects of open water dumping, in 1975 Maryland prohibited the discharge of spoil from Baltimore Harbor unless it was deposited in containment facilities. Md. Ann. Code, Sec. 8-1602.

creased the area of Miller Island from 50 acres in 1933 to 33 acres in 1967. The maximum elevation of either island is 5.5 feet.

The disposal area will be 1,100 acres, approximately 12,430 feet by 4,700 feet, and will contain 52 million cubic yards of sediment when filled to its capacity of 18 feet above mean low water. About 52 percent of Miller Island (18.4 acres) and 11.5 percent of Hart Island (10.9 acres) will be covered by the facility. The dike will be constructed from sand deposits adjacent to and underlying the enclosure, and the face toward the bay will be rip-rapped with stone. Three sluice gates will be provided to prevent overtopping and washout of the dike. The islands are approximately one mile from the nearest point on the mainland, the western side of the bay. The containment area will be located on the eastern or bay side of the islands. The dike will extend from Hart and Miller Islands no more than 4,700 feet into the Bay in an area where the Bay is about 7 miles wide. Essentially the area is made by connecting Hart and Miller Islands with a wall, and, using the islands as two corners, then extending other walls into the Bay at right angles to the connecting wall between the islands, the ends of the walls extended into the Bay then being connected by another wall.

The dredged material will be retained in the disposal area for months or years. Sediment will settle and water will slowly percolate through the bottom of the dike until a water-level equilibrium is reached. All particulate matter will be retained in the containment area. While the Harbor spoil can be expected to contain substances that exert a biochemical oxygen demand, the slow filtration through the dike walls will eliminate the oxygen demand before the filtrate reaches the Bay. Sedimentation and filtration, coupled with the long retention period, will effectively remove and destroy any pathogenic bacteria that might be present in the Harbor mud.

The Army Corps of Engineers processed the permit application under Section 10 of the Rivers and Harbors Act. Since the adoption of that statute, the Corps has consistently interpreted Section 9 as requiring Congressional approval only for structures which completely span a navigable waterway. Under Section 10, the Corps has administratively authorized structures which do not extend entirely across a waterway, no matter how large and whether or not called dikes. See *infra* at 23-24. The Corps argues that the statute is ambiguous and therefore the paucity of case law emphasizes the significance of the relevant legislative history and administrative practice and interpretation. The Supreme Court has held in a case involving this very statute that we should look to the administrative construction thereof, and has also held at least Section 10 is ambiguous and probably Section 9 as well. In *Wisconsin* v. *Illinois*, 278 U.S. 367 (1929), the Court upheld the validity of a Section 10 permit authorizing diversion of water from Lake Michigan, rejecting the argument that the diversion required Congressional approval because it constituted an obstruction to navigation. After briefly describing the legislative history of the Rivers and Harbors Act of 1899, the Court stated:

> Congress, having stated in Section 9 as to what particular structures its specific consent should be required, intended to leave to the Secretary of War, acting on the recommendation of the Chief of Engineers, the determination of what should be approved and authorized in the classes of cases described in the second and third clauses of Section 10. If the section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of the undertakings specifically provided for in the second and third clauses of Section 10 could safely be undertaken without a special authorization of Congress. We do not think this was intended. . . .

> The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction.
>
> This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute. . . .
>
> The practice is shown by the opinion of the Acting Attorney General, transmitted to the Secretary of War, 34 Op. Atty. Gen. 410, 416. The Secretary of War acted on this view on May 8, 1899, about two months after the passage of the Act. . . . The fact that the Secretary of War acted on this view was made known to Congress by many reports.

278 U.S. 367, 412-414 (Citations omitted).

Very few cases have dealt with Section 9 and the meaning of the word dike. *Citizens Committee for the Hudson Valley v. Volpe,* 302 F.Supp. 1083 (S.D. N.Y. 1969), aff'd 425 F2d 97 (2d Cir. 1970), cert. denied (sub nom *Parker v. Citizens Comm. for Hudson Valley*), 400 U.S. 949 (1970), involved a permit to construct an expressway along the east bank of the Hudson River. The construction protruded into the river. The district court held that Congressional consent was necessary for construction of a rock dike parallel to the shore of the river, designed to contain fill and thus create new land to support the highway. Relying on dictionaries, the court applied the ordinary meaning to the term dike as used in Section 9. 302 F.Supp. at 1088-89. The Court of Appeals affirmed in an opinion primarily concerned with questions of standing and jurisdiction, which only "briefly" addressed the merits. 425 F2d 97, 196.

The Corps and the State argue that the record before the court in *Hudson Valley* was deficient because it did not contain the full legislative and administrative history materials presented to the court below in this case.

In *Petterson v. Resor,* 331 F.Supp. 1302 (D. Or. 1971), remanded as moot, 494 F2d 124 (9th Cir. 1974), the court did not have the benefit of legislative and administrative history materials, and adopted a more limited interpretation of Section 9. The project at issue involved depositing fill, surrounded by a retention structure, in the South Slough of the Columbia River in order to support an airport runway extension. The district court determined that the project did not involve dikes (within the meaning of Section 9) because Congressional consent was required only "for those structures like bridges, dams and dikes, usually larger structures, which are placed across a river and which constitute an obstruction to navigation." 331 F.Supp. 1302, 1306. The court held that the runway extension did not obstruct navigation and thus Congressional approval was not required. The case became moot because the Port of Portland formally withdrew its plan to enlarge the airport, and as a result the Corps of Engineers canceled the permit. *Citizens Committee for the Columbia River v. Callaway,* 494 F2d 124, 125 (9th Cir. 1974).

A 42 mile canal was at issue in *Sierra Club v. Morton,* 400 F.Supp. 610 (N.D. Calif. 1975). Because the structure, labeled a canal, would cross and completely dam and obstruct a navigable river, the court determined that it was a "dam" or "dike" within the meaning of Section 9. 400 F.Supp. 610, 626-27.

The challenged project in *Citizens Committee for Environmental Protection v. United States Coast Guard,* 456 F.Supp. 101 (D. N.J. 1978), involved placement of fill behind retaining walls in the Raritan River, in order to support a highway extention. Rejecting the plaintiffs' argument that the fill constituted a dam or dike, the court de-

termined that the critical question was whether the activity constituted an unreasonable obstruction to navigation. Since the impact of the project on actual navigation was negligible, the court held the Corps was justified in determining that Section 9 did not apply, 456 F.Supp. 101, 113-14, and that a Section 10 permit was sufficient.[6]

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[6] Other courts, without addressing the issue, have applied Section 10 to dikes that do not span a waterway. In *United States* v. *Bailey*, 467 F.Supp. 925 (E.D. Ark. 1979), the Corps had issued a permit, pursuant to Section 10, for the construction of a dike extending into but not across the Arkansas River. The court held that the Government was estopped from asserting that the dike was constructed in violation of a restriction embodied in the Corps' permit.

In *United States* v. *Cameron*, 466 F.Supp. 1099 (M.D. Fla. 1978), it is apparent that both the court and the parties would have applied Section 10 to a dike but for the fact that the dike was located above the ordinary high water mark.

Magno v. *Corros*, 439 F.Supp. 592 (D. S.C. 1977), was a wrongful death action arising out of the collision of a boat with a rock dike protruding 1,100 feet into a river. The court noted that the United States had clear authority to construct the dike, citing Section 10. 439 F.Supp. at 599.

One other court would have applied Section 9 to a dike that did span a waterway. *Environmental Defense Fund* v. *Alexander*, 467 F.Supp. 885 (N.D. Miss. 1979), was a challenge to construction of the Tennessee-Tombigbee Waterway which Congress authorized in 1946. A quarter of a century later, the Corps authorized modifications in the still uncompleted project to add dams, dikes, and causeways. The court held that construction of "dikes or causeways across the Tibbee and Tombigbee River," without specific Congressional approval, would violate Section 9 but for the fact that the structures were temporary and, upon completion of the project, would be covered by thirteen feet of water. 467 F.Supp. at 911. The court relied on *Sierra Club* and *Hudson Valley*, but, since the structures extend across the river, the holding is consistent with *Petterson*.

The court also held that a project modification to replace levees along the side of the waterway with five dams across the canal section of the waterway was within the Corps' discretion and did not constitute a violation of Section 9 although the damming structures extended across the waterway.

Plaintiffs claim that the language contained in the Rivers and Harbors Act is clear, and that its plain meaning should control without reference to legislative history or administrative practice. The few decided cases do not support this argument. Plaintiffs in *Petterson v. Resor* relied on *Hudson Valley*, but the *Petterson* court refused to do so. In *Sierra Club v. Morton*, the court professed to follow *Hudson Valley*, but its holding is consistent with *Petterson*. *Citizens Committee for Environmental Protection* declined to follow either *Hudson Valley* or *Sierra Club* and instead applied the test of *Petterson*. If the language we have quoted from *Wisconsin v. Illinois* is not sufficient, these conflicting interpretations of Section 9 demonstrate that the language is not clear and has no plain meaning apparent to the courts.

As the nation grew and expanded in the nineteenth century, State legislatures authorized construction of dams and bridges that blocked waterborne commerce on navigable rivers. Challenges to these actions resulted in Supreme Court holdings that, in the absence of federal legislation to the contrary, the States had the power to authorize construction of bridges, dams, or other structures even if they obstructed navigation.[7] Congress responded by providing for affirmative federal regulation of obstructions to navigation in order to control the proliferation of bridges which obstructed commercial river navigation. 21 Cong. Rec. 8602-05, 8607, 8684, 9813 (1890); see 40 Cong. Rec. 1717 (1906). Section 7 of the Rivers and Harbors Act of 1890, 26 Stat. 453, 454, in general terms, prohibited the construction of all obstructions to navigation unless ap-

[7] The Supreme Court rejected claims that the common law of the United States prohibits obstructions in our navigable waters, *Williamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 8 (1888), and that language in State enabling acts declaring that navigable waters must remain "forever free" was an expression of Congressional intent to prohibit State authorized obstructions. *Id.* at 12; *Cardwell* v. *American River Bridge Co.*, 113 U.S. 205 (1885).

proved by the Secretary of War.[8] The first clause of that section prohibited building any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or other structure, not within established harbor lines, so as to obstruct or impair navigation, without the permission of the Secretary of War. The second clause prohibited the construction of any bridge, bridge-draw, bridge piers and abutments, causeway, or other works, over or in any navigable waters, under any act of the legislative assembly of any State, unless approved by the Secretary of War.

Congress, in 1896, directed the Secretary of War to prepare a compilation of existing laws relating to the pro-

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[8] Section 7 of the Rivers and Harbors Act of 1890, 26 Stat. 454:

That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor-lines, or in any navigable waters of the United States where no harbor-lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge-draw, bridge piers and abutments the construction of which has been heretofore authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such state.

tection of navigable waters, along with suggestions for a revision. Rivers and Harbors Act of 1896, Section 2, 29 Stat. 202, 234. The Corps of Engineers submitted the draft revision along with the compilation in 1897. After the Rivers and Harbors Bill of 1899 had been passed by the House (H. R. 11795; 32 Cong. Rec. 1408 (1899)), the Corps' draft was introduced in the Senate as an amendment to the bill with the representation that it, except amendments, was in accord with existing statutes. 32 Cong. Rec. 2296-2297 (1899). The Senate passed the bill, as amended, the same day. 32 Cong. Rec. 2302. The Conference Committee accepted the amendments and renumbered the relevant portions as Sections 9 and 10. The House Conferees presented the final bill to the House with the following statement:

> The bill as now agreed upon and presented also includes a codification of existing laws pertaining to rivers and harbors, though containing no essential changes in the existing law. 32 Cong. Rec. 2923.

Both houses accepted the Conference Report, and the bill, as drafted by the Corps, became law. 32 Cong. Rec. 2843, 2925, 2934 (1899). Thus, the Corps' draft became Sections 9 and 10 of the Rivers and Harbors Act of 1899. Congress passed the Act, without carefully examining its provisions, on the strength of representations that the Act made no significant change in existing law. As the Supreme Court put it, "Sections 9 and 10 [of the 1899 Act] were the rearranged result of the provisions of Sections 7 and 10 of the Act of 1890."[9] *Wisconsin v. Illinois,* 278 U.S. 367, 412

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[9] A close examination of Sections 9 and 10 and their predecessor provisions resolves any apparent inconsistency between the Supreme Court's statement that Sections 9 and 10 of the 1899 Act are derived from Sections 7 and 10 of the 1890 Act, and our taking clauses 1 and 2 of Section 7 of the 1890 Act as the relevant predecessor provisions. Both of the clauses at issue here (Section 9, clause 1 and Section 10, clause 2, of the 1899 Act) are derived

(1929). It is entirely proper to interpret the ambiguous 1899 Act in light of its predecessor statutory provisions.

As stated, the issue in the present case is whether the Hart and Miller Islands disposal area is governed by the second clause of Section 10 or the first clause of Section 9 of the 1899 Act. The second clause of present Section 10 (33 U.S.C. § 403) derives from the first clause of Section 7 of the 1890 Act. The only significant change is that dam is not among the structures listed in the present Section 10. The first clause of Section 9 (33 U.S.C. § 400) derives from the second clause of Section 7 of the 1890 Act, which referred to works authorized by State legislatures.

A comparison of the 1890 and 1899 statutes, however, reveals there was in fact a change from 1890, when all authority was delegated to the Secretary of War, to 1899, when a part was reserved to Congress. Remembering the representations in Congress of no substantial change, that change is understood in light of *United States v. Keokuk & H. Bridge Co.*, 45 Fed. 178 (S.D. Iowa 1891) and *United States v. Rider*, 50 Fed. 406 (S.D. Ohio 1892). Both cases dealt with Congressional delegation, to the Secretary of War, of the power to compel alteration of bridges that obstruct navigation, parts of the Rivers and Harbors Acts. In broad dictum, the first case indicated it would be an unauthorized delegation of power by Congress to "confer upon the secretary of war the power to determine when and where bridges should be built over the navigable rivers of the country," 45 Fed. 178, 183, and held invalid the delegation of power to the Secretary of War to declare lawfully constructed bridges to be obstructions to naviga-

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from Section 7 of the 1890 Act. Clause 1 of Section 10 of the 1899 Act, which prohibits "the creation of any obstruction" to navigable waters without authorization, and which is not at issue here, is derived from the first sentence of Section 10 of the 1890 Act. *Compare* 30 Stat. 1151, 33 U.S.C. §§ 401, 403, *with* 26 Stat. 453, 454 and 27 Stat. 110.

tion. The second case, construing the Rivers and Harbors Act of 1890, relied upon the first and held that the statute impermissibly delegated legislative power. 50 Fed. 406, 410. These cases thus limited Congressional power to delegate authority over two structures that completely spanned navigable rivers. Neither case dealt with obstructions that did not span navigable waters. Section 9 of the 1899 Act differs from its predecessor because it requires Congressional approval, and it adds dams and dikes to the list of structures affected. The legislative history of the Act together with the then prevailing precedents, *Keokuk* and *Rider*, indicate that Section 9 may well have been intended to require Congressional approval only where agency approval would have been an unconstitutional delegation of legislative power, i.e. for bridges, causeway, dikes, or dams that completely span navigable waterways. In all events, this is a perfectly reasonable construction of the statute, and it has been so construed by the Corps since its passage. Taking the view of the structures listed in Section 9 of the 1899 Act, two are works which, by definition, span waterways (bridges and dams). Dikes as used in that section, according to this construction, should be interpreted to include only dikes that span waterways.

The Corps of Engineers, the agency that wrote the statute and is charged with its execution, has interpreted Section 9 as applying only "to that class of structures such as bridges and dams which extend entirely across a waterway." Lecture of Judge G. W. Koonce, O.C.E. to Company Officer's Class, Engineer School Fort Humphrey's, Virginia, April 23, 1926, as reproduced in Hearings on Water Pollution Control Legislation—1971 (Oversight of Existing Programs) Before the House Committee on Public Works, 92nd Cong., 1st Sess., Ser. 92-10, 284-291, at 288 (1971). Section 10, according to the Corps, "relates to the construction of works in the nature of wharves, piers, jetties, and the like, which project into, rather than cross, the bodies of water in which they are located." *Id.* at 289. The Secretary

of War, in testimony before the House Commerce Committee in 1916, stated that Section 10 gives his department "the authority to permit or refuse to permit any obstruction, except the class which extend clear across a stream, however large and important, in any navigable water of the United States." Hearings on General Dam Legislation Before the House Committee on Interstate and Foreign Commerce, 64th Cong., 1st Sess., at 18 (1916). The then Chief of the Miscellaneous Civil Branch of the Corps of Engineers, James E. DeSista, summarized the Corps' interpretation and practice in an affidavit originally prepared for the *Petterson* case which was also before the court below.

> It has been my interpretation, and that followed by my predecessors in office, that the terms "dike" and "causeway" as used in Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. 401, refer to a structure which results in the closure of a navigable waterway by extending completely across same so as to block navigation if no provision is made for its passage. The building of a bulkhead, retaining wall, or revetment behind which solid fill is placed in navigable waters for use as a retaining structure has been administratively interpreted to constitute a class of structures which can be authorized by the Secretary of the Army under Section 10 of the Act, 33 U.S.C. 403, notwithstanding that such bulkheads, retaining walls, or revetments are frequently referred to in the vernacular as dikes or causeways.

Affidavit of James E. DeSista, August 6, 1970.

The DeSista affidavit lists 20 "significant solid fill retaining structures" that have been authorized under Section 10, dating from 1920 to 1969. *Id.* The affidavit of John P. O'Hagan, Chief of the Operations Division of the Baltimore District of the Corps, submitted to the court below,

confirms the DeSista affidavit and also lists 25 diked disposal areas authorized by the Baltimore District alone during fiscal years 1972 through 1977.[10] Affidavit of John P. O'Hagan, May 18, 1978. The Corps' regulations implementing Section 9 of the 1899 Act, as amended in 1977, define a dike as

> an embankment, low dividing wall or other protective structure that completely spans a navigable waterway of the United States and that may obstruct interstate waterborne commerce.

33 C.F.R. 321.2(c), 42 Fed. Reg. 37139. While prior regulations contained no such explicit definition of dike, published regulations giving effect to the Corps' interpretation are found in the Code of Federal Regulations since its inception. See, e.g., 33 C.F.R. 209.120 (1948); 33 C.F.R. 209.120 (b)(1)(a) (1969); 33 C.F.R. 209.120 (1974).

In construing Sections 9 and 10, we are guided by the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381 (1969).

The Corps' interpretation deserves more than usual deference in this case for several reasons. It drafted the bill which became the 1899 Act, and administers both Sections 9 and 10 of the Act, and therefore has special familiarity with the interrelationship between the two sections. The Corps has interpreted and administered the Act consistently for a period of over eighty years. The Supreme Court, in *Wisconsin v. Illinois, supra,* specifically sanctioned reliance upon the Corps' administrative interpretation and administration of the Act. As early as 1916

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[10] In 1972 Congress amended the Federal Water Pollution Control Act to encourage the use of dike disposal facilities. See *infra,* pp. 26-28.

the Secretary of War made the Corps' view known to Congress. Judge Koonce's speech, for example, stating the Corps' interpretation that Section 9 only applies to structures which extend completely across a waterway, was submitted to Congress during 1971 hearings on water pollution control legislation. See *supra*, p. 15-16.

The legislative history of the Federal Water Pollution Control Act Amendments of 1972 demonstrates that Congress was not only aware of, but approved and encouraged the Corps' practice of issuing permits for diked disposal areas, without specific Congressional approval. Section 404 (a) of the FWPCA, 86 Stat. 816, 884, 33 USC § 1344(a), provided:

> The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.[11]

In the House, Representative Vanik spoke to federally funded programs to halt the open-water disposal of dredged spoil. He sought and received assurances that Section 404 would not terminate the Corps' existing program of placing polluted dredgings "in dike or land sites," as opposed to open-water dumping. Legislative History of the Water Pollution Control Act Amendments of 1972, p. 421. He stated that the Corps of Engineers gave him "a list of the harbors where dredgings were being placed in land or diked disposal sites," and inserted the data in the Congressional Record. Representative Vanik's concern was that not enough harbors were included in the program. *Id.* at 422.

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[11] In 1977 Congress amended this section, in immaterial ways that are not relevant here. 33 U.S.C. § 1344(a), Pub. L. 95-217, 91 Stat. 1566.

During Senate consideration of the Conference Report, Senator Muskie, the primary Senate manager for the bill, reported.

> The Conferees were uniquely aware of the process by which the dredge and fill permits are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed.
>
> . . .
>
> At the same time, the Committee expects the Administrator (of the Environmental Protection Agency) and the Secretary (of the Army) to move expeditiously to end the process of dumping dredged spoil in water—to limit to the greatest extent possible the disposal of dredged spoil in the navigable inland waters of the United States including the Great Lakes—to identify land-based sites for the disposal of dredged spoil and, where land-based disposal is not feasible, to establish diked areas for such disposal.
>
> All of these alternatives are available.

118 Cong. Rec. 33699 (1972). Congress, when it authorized the Baltimore Harbor Channel Project in 1970, gave an indication of its understanding that its further approval was not needed for diked disposal facilities. That Congress expected the dredged spoil to be placed behind retaining structures such as the dike at issue here is shown in the House Report:

> *Local cooperation.*—Provide without cost of all lands, easements, and rights-of-way for construction and maintenance of the project and for aids to navigation, including spoil disposal areas, retaining dikes, bulkheads and embankments or the costs of such retaining works. . . .

H.R. Rep. No. 1665, 91st Cong., 2d Sess., 10 (1970).

For most of this century at least, Congress has been aware of the Corps' interpretation of the Act. When it amended the Federal Water Pollution Control Act, Congress was well acquainted with the prevailing Corps' practice of authorizing diked disposal areas pursuant to Section 10 of the 1899 Act. Congress has never interfered with this long-standing administrative practice. Even if it has not in terms ratified the Corps' practice, Congress at least considers the practice to be consistent with the Act. See *Boesche v. Udall*, 373 U.S. 472, 483 (1963).

Sections 9 and 10 of the Rivers and Harbors Act of 1899 must be construed together in a logical and consistent manner in order to best effectuate the intent of Congress. A logical distinction between those structures listed in Section 9 (which require Congressional approval) and those listed in Section 10 (which do not) is that the former class of structures completely span a waterway, while the latter do not. Section 9 structures are capable of completely blocking a navigable waterway, while Section 10 structures merely protrude into a waterway and require only a rerouting of waterborne traffic. Since Section 9 structures usually necessarily destroy navigation, they require Congressional approval. Since Section 10 structures do not usually or necessarily destroy, but merely obstruct, navigation, they require only Corps approval.

Finally, as the *Petterson* court noted, the expansive reading of Section 9 put forward by the plaintiffs could render Section 10 meaningless, since structures such as jetties, breakwaters, and fills would be covered by Section 9 although they are literally within Section 10. Limiting Section 9 to waterway-spanning structures, as the Corps has done, provides a clear, convenient, and workable distinction between Section 9 and Section 10. This construction is reasonable and is supported by the legislative history of the statute.

We hold that the Corps of Engineers acted correctly in processing the application for the Hart and Miller Islands diked disposal facility under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. Accordingly the judgment appealed from is

REVERSED.

Filed: May 28, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM77-973

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., and HONORABLE CLARENCE LONG, M.C., and HONORABLE NORMAN R. STONE and MARYLAND WILDLIFE FEDERATION, INC. and JOHN HENDERSON and HOWARD SAPPINGTON and GEORGE WOHLLEBEN and ROBERT SCOTT and MARGARET CALDWELL and CHARLES JUSTICE

v.

THE CORPS OF ENGINEERS OF THE UNITED STATES and HONORABLE CLIFFORD L. ALEXANDER, Secretary of the Army, and LT. GEN. JOHN W. MORRIS, Chief of Engineers of the United States Army and COL. G. K. WITHERS, District Engineer, Baltimore District, U.S. Army Corps of Engineers

STATE OF MARYLAND, *ex rel.* FRANCIS B. BURCH, ATTORNEY GENERAL OF MARYLAND

MEMORANDUM AND ORDER

On June 30, 1977, a number of environmental groups and interested individuals filed suit against the Corps of Engineers (hereinafter the Corps), seeking in an eleven count complaint relief from the issuance of a permit by the Corps to the State of Maryland for the construction of a dike and disposal area in the Chesapeake Bay. On October 10, 1977, this court granted the motions of the State of Maryland and the Steamship Trade Association of Baltimore, Inc. to intervene as defendants in this action. Since that time, all parties have engaged in extensive discovery and on May 31, 1978 all parties filed cross motions for summary judgment. The motions for summary judgment were the subject of oral argument on June 21, 1978 and it is the purpose of this memorandum and order to rule on these motions.

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Background

On February 23, 1972, the State of Maryland, through its Department of General Services, filed an application with the Corps for a permit under the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq.*, (sometimes herein referred to as the Act) and Section 404 of the Federal Water Pollution Control Act Amendments of 1972, as amended, 33 U.S.C. § 1344, to construct a dike and dredged spoil disposal facility at Hart and Miller Islands in the Chesapeake Bay. The stated purpose of the dike and disposal area is to contain approximately fifty-two million cubic yards of dredge spoil to be removed from the Baltimore Harbor and its channel approaches.

Hart and Miller Islands are located within Chesapeake Bay approximately thirteen miles east of Baltimore, Maryland. The dike and containment area is to be constructed on the bayward (eastern) side of Hart and Miller Islands about one mile from the mainland and will occupy an area of 1,100 acres or approximately two square miles. The dike itself is to be constructed with sand which will be dredged from deposits within the disposal area. Construction is estimated to take two years.

When the dike is completed, its walls will stand eighteen feet above mean low water, somewhat higher than the current maximum elevations of Hart and Miller Islands which are 5.5 feet and 2.3 feet, respectively. However, only twelve percent of Hart Island and fifty-two percent of Miller Island will be covered by the disposal area. Basically, the disposal area will be rectangular in shape with the islands fitting in to the northwestern, longer side of the area and the structure occupying principally an area to the southeast of the islands.

Dredged spoil will be transported to the disposal area by pumping the material through hydraulic pipelines either from the dredging sites in the Baltimore Harbor or from barges which will carry the dredged spoil from the dredging site to the disposal area. The dredged material will be

pumped into the diked containment area and the sand walls of the dike will allow the water to percolate out of the containment area, leaving only the dredged material inside of the containment area. Once the area has been completely filled with dredged spoil, the entire area will be at the height of eighteen feet above mean low water. As a means of protection against erosion on the bayward side of the structure, this side will be rip-rapped with stone, all other sides consisting of the sand constructed walls of the dike.

At present, the expected life of the containment area is uncertain. If the area is used only for the disposal of dredging spoil from maintenance dredging of the Baltimore Harbor and other shipping channels, the expected life of the area is twenty to thirty years. If the area is used to accommodate dredged material from the Baltimore Harbor Channel project, its life expectancy is ten years. The Baltimore Harbor Channel project is a project to deepen the Harbor and its channel approaches from the present depth of thirty-nine to forty-two feet to a depth of fifty feet in order to allow the entry of larger cargo vessels. Congress has authorized the funds for this project (Public Law 91-611) provided the State of Maryland furnishes a disposal site for the dredged spoil from the project. It is estimated that the total dredged spoil from the project will amount to one hundred million cubic yards thus indicating that the Hart and Miller Islands project will accommodate, at best, only fifty percent of this spoil.

After the filing of the application for a permit by the State of Maryland in February of 1972, the Corps began its consideration of the application with the permit finally being issued to the State on November 22, 1976. After initial review of the application, the Corps held a public hearing on August 29, 1972 and in February 1973, the Corps completed its draft environmental impact statement. The initial evaluation of the application occurred in a report dated July 18, 1974 prepared by the District Engineer of the Baltimore District. A second public hearing was held on May 10, 1975 after the Corps had conducted additional

water quality analyses required under the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* The Corps' final environmental impact statement was completed in early 1976, this report being required pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* Upon completion of the impact statement, the District Engineer for the Baltimore District prepared a report on the application recommending issuance of the permit with the inclusion of certain conditions in the permit. This recommendation was concurred in by the Corps' North Atlantic Division on March 8, 1976 and the final report was sent to the Corps' headquarters in Washington for the final approval. Final approval was given in November 1976 and the State of Maryland was issued a permit for the diked disposal facility under 33 U.S.C. §§ 403 and 1344.

The administrative record of the Corps' consideration of the permit application is described in the Government's Index to the Administrative Record filed with this court. However, the parties have agreed that the entire administrative record need not be filed and the parties have submitted those documents which they feel bear on the issues raised in the motions for summary judgment as exhibits to their motions. The court is at liberty to request that any additional documents be supplied should the court feel the need to examine additional documents in conjunction with the instant motions.

The eleven counts of plaintiffs' complaint cover numerous allegations having to do with the authority of the Corps to issue the permit and the administrative process undertaken by the Corps in determining that the permit should be granted. The claims of plaintiffs can be summarized as follows: Count one asserts that the Corps acted improperly in issuing the permit to the State of Maryland under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, in that the particular project which was the subject of the permit could only be issued under Section 9 of the Act, 33 U.S.C. § 401. Section 9 requires that Congressional

approval of the project be obtained in addition to the issuance of a permit by the Corps. Plaintiffs assert in Counts two through eight that the Corps failed to evaluate adequately the integrity of the proposed construction project, the alternatives to the proposed structure, the probable adverse and cumulative impacts of the structure in the Hart and Miller Islands vicinity, local zoning and permit restrictions affecting the proposed project, and the monetary costs of the permitted project. Plaintiffs allege that the failure to consider these matters adequately is a violation of the National Environmental Policy Act and the Corps' regulations. Counts nine through eleven contain claims that the Corps acted arbitrarily, capriciously and in bad faith with respect to the environmental impact statement and the decision to grant the permit to the State.

I. The Rivers and Harbors Act of 1899

The application of the State of Maryland for a permit to construct the diked disposal area at Hart and Miller Islands was filed and processed by the Corps under Section 10 [1] of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403.

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[1] Section 10 of the Act provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Plaintiffs contend that the permit can be issued only under the authority of Section 9[2] of the Act, 33 U.S.C. §401, because the permit authorizes the construction of one or more dikes in navigable waters of the United States. In turn, plaintiffs assert that Section 9 requires Congressional authorization of the project and, as this has not been obtained, the permit is void as an overstepping of authority by the Corps. Defendants counter with the assertion that issuance of the permit pursuant to Section 10 of the Act was appropriate as that section does not require Congressional consent for the deposit of fill material or construction of certain structures such as breakwaters, bulkheads and jetties in the navigable waters of the United States. Thus, the primary legal issue raised in the cross motions for summary judgment is whether the Corps has authority to permit the construction by the State of Maryland of a diked spoil disposal facility in navigable waters of the

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[2] Section 9 of the Act provides:

> It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

United States by its action of issuing the permit on November 22, 1976.

All parties are agreed that the Chesapeake Bay, the body of water in which the proposed construction is to take place, is a navigable body of water. Further, the parties are agreed that the navigable portions of the Bay do not lie wholly within the limits of one state; rather, the Bay is shared by the State of Maryland and the Commonwealth of Virginia. Additionally, defendants have conceded that Congressional authorization of the project pursuant to Section 9 was not sought because of the position that such authorization was not required. It appears that what does remain for resolution on the issue of whether Section 9 is the appropriate section under which the diked disposal facility should be authorized are: (1) the question of whether the proposed facility in this case is a dike within the meaning of Section 9 (or whether portions of the facility come within the classification of a dike), and (2) the question of whether the dike, if one is found to be contemplated, is to be placed "over or in any . . . navigable water of the United States."

The parties have presented many and varied arguments on the interpretations of Section 9 which they seek to have the court adopt. In order to respond to these arguments, the court has attempted to categorize these arguments in the following manner: (1) reported case law on the interpretation of Section 9, (2) history of section 9 and Section 10, and (3) the Corps' past administrative practice with respect to the application of Sections 9 and 10.

The Reported Case Law

Turning first to the cases, the parties are in dispute over the applicability of cases which reach conflicting conclusions in interpreting Section 9 generally and particularly the term "dike." The court has been cited to two district court decisions which appear to give conflicting definitions of the

term "dike." *Citizens Committee for the Hudson Valley v. Volpe,* 302 F.Supp. 1083 (S.D. N.Y. 1969), *affirmed,* 425 F.2d 97 (2nd Cir. 1970); *Petterson v. Resor,* 331 F.Supp. 1302 (D.C. Oregon 1971), *remanded as moot,* 494 F.2d 124 (9th Cir. 1974).

In *Citizens Committee for the Hudson Valley,* the Corps had issued a permit to the State of New York which permitted a fill operation for the purpose of constructing the Hudson River Expressway. The permit had been issued pursuant to Section 10 of the Rivers and Harbors Act of 1899. The expressway was planned to extend approximately nine miles along the eastern shore of the Hudson River. Some 22,000 feet of the highway were to rest on 9,500,000 cubic yards of fill which would extend at its widest point some 1,300 feet into the river. The district court noted that the main issue between the parties was whether Section 9 should apply to the project, with plaintiffs contending that since the project involved dikes, causeways and bridges to be built in or over navigable waters of the United States, the Corps had exceeded its authority in issuing the permit pursuant to Section 10. In determining whether a dike was involved in the project, the court examined the permit itself, as well as the plans for the project, and found both to contain numerous references to "dikes." The district court also noted that the plans prepared in connection with the securing of bids on the project illustrated and described various types of dikes to be included in the project. Defendants in that case countered with the argument that even if dikes were involved, Section 9 would not apply as the dikes would not have a substantial effect on navigation. Further, defendants argued that Congress meant the term "dike" in the Act of 1899 to be given the meaning stated in Chambers Technical Dictionary, p. 273 (3rd Rev. ed with Supp. 1958) which was as follows: "a wall or embankment of timber, stone, concrete, fascines, or other material, built as a training works for a river so as rigidly to confine flow within definite limits over the length treated." From this

definition, the defendants supported their argument that a dike must substantially affect navigation before it will be one included within the meaning of that term in Section 9. The district court concluded that dikes were contemplated in the project and that said dikes came within the meaning of the term as used in Section 9:

> We hold, based on the evidence presented at trial, that 'dikes,' characterized as such by the defendants, are to be constructed along the western side of the fill and that Congress when it said 'any dike' over or in any navigable river meant exactly that. Therefore, the Corps of Engineers exceeded its statutory authority in issuing the permit which enables the State to commence advertising for bids.
>
> In the absence of any legislative or judicial authority to support the defendants' theory of statutory interpretation we apply the ordinary meaning to the term 'any dike.' Dike is defined as '[a] bank, as of earth, thrown up to form a barrier, line of demarcation or the like * * *.' Webster's New International Dictionary, 2d Ed., p. 730 (1954); 'An embankment for controlling or holding back the waters of the sea or a river.' Random House Dictionary of the English Language, p. 403 (1967). 'Statutes are to be construed by attributing its ordinary meaning to the language used.' . . . Consequently, we hold that if Congress meant to confine its jurisdiction to only those dikes that substantially affect navigation, it would have said so. Since proposed dikes are involved and will be 'over or in' a navigable river of the United States, we leave to Congress, when it decides if it will approve the project, the consideration of the effect of the dikes on navigation. (citation omitted) 302 F.Supp. at 1088-1089.

On appeal, the Second Circuit Court of Appeals briefly discussed the merits of the case and adopted the conclu-

sions of the district court with respect to the definition of the term dike:

> . . . [t]he district court concluded that construction of both a 'dike' and a 'causeway' were contemplated by the State. The court was called upon to construe the meaning of those terms as they were used in § 401 of the Rivers and Harbors Act of 1899, and as they applied in fact to the Expressway plans before it. Having carefully reviewed the pertinent evidence and considered the governing rules of statutory construction, we adopt the conclusion of the district court that the word 'dike' used by the defendants in their permit has the same meaning there as in § 401 of the Act, and that construction of a dike is forbidden by that Section without the consent of Congress. 425 F.2d at 106.

In *Petterson v. Resor, supra,* the district court determined that the approach of the court in *Citizens Committee for the Hudson Valley* of using the common dictionary definition of the term "dike" was inappropriate in view of the legislative history of Sections 9 and 10 and the administrative practice of the Corps. That case involved a permit issued by the Corps under Section 10 for the extension and relocation of an airport runway. Said extension was to occur on a fill to be constructed in the South Slough of the Columbia River. The construction of the fill involved the removal of all or portions of three islands by dredging and the placing of the dredged material in the fill area. The court noted: "These improvements will not affect the main channel or the navigability of the Columbia River which flows between Oregon and Washington. In fact, the improvements will increase the navigability of the river." 331 F.Supp. at 1303. Although the court apparently relied upon the legislative history of Sections 9 and 10, the court does not indicate exactly which portions of the history were relied upon and does not specifically refer to any

particular documents, Congressional or otherwise. The court merely states:

> Here, defendants presented the evidence of legislative history and consistent administrative practice which was not before the court in *Hudson Valley*. This evidence supports the defendants' contention that § 401 requires *Congressional consent for dikes only when they are obstructions to navigation*. . . .
>
> The legislative history shows that Congress enacted the Rivers and Harbors Appropriation Act of 1899, Ch. 425, 30 Stat. 1121, as a comprehensive plan for keeping our interstate waterways clear of unreasonable obstructions and structures. It required approval of the federal government for work on *navigable interstate waterways*. Every structure built in a *navigable waterway* required the approval of the Chief of Engineers and the Secretary of the War (now the Secretary of the Army). In addition, for those structures like bridges, dams and dikes, usually larger structures, which are placed across a river and which constitute an obstruction to navigation, Congressional consent was required. This distinction was written into the law, apparently because of the belief that Congress could not constitutionally delegate to the Secretary of War or to any other agency the authority to permit an obstruction of a navigable waterway. *United States v. Keokuk & H. Bridge Co.*, 45 F. 178 (S.D. Iowa 1891). (emphasis supplied) 331 F.Supp. at 1306.

Additionally, the court looked to various examples of other projects which had been permitted by the Corps under Section 10 and which were projects involving the extension of airport runways. The court found that the mere designation of a project as a "dike" was not determinative "if the proposed improvement did not obstruct navigation." 331 F.Supp. at 1306.

On appeal, *Petterson* was remanded to the district court to vacate the previous judgment and to enter a judgment of dismissal of the action as moot. 494 F.2d 124 (9th Cir. 1974) Plaintiffs argue that the entry of a judgment of dismissal as moot relegates the opinion of the district court to an advisory status because the term "moot" indicates that the point remains undecided. Because the jurisdiction of the federal courts requires that a case or controversy exist in fact, it has been the practice of the Supreme Court in a case which has become moot pending final decision to remand with directions to dismiss the action. *See United States v. Munsingwear,* 340 U.S. 36 (1950). The rationale of this procedure applies with equal force to a remand from a court of appeals with directions to dismiss and was aptly stated by the Supreme Court as follows:

> That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary. 340 U.S. at 40.

Thus, the decision in *Petterson* must be viewed by this court as a preliminary decision which has not undergone the review sought by the side losing the case in the district court. As such, this court will consider the opinion as carrying only advisory weight on the issues presented in the instant action.

The court also notes that if it were to accept the reasoning of the district court's opinion in *Petterson,* that case is clearly distinguishable on the facts as the district court stated that the improvements to the airport in that case in no way obstructed navigation on the Columbia River but rather would enhance such navigation, apparently because all or portions of three small islands in the river were to

be removed by dredging to construct fill for a runway extension. In the present case it cannot be said that the dike and the large impoundment area in the bay created by it will enhance the navigability of the bay.

The court has been cited to an additional case which dealt with the application of Section 9 to a structure deemed to be a dike within the meaning of that section. *Sierra Club v. Morton,* 400 F.Supp. 610 (N.D. Calif. 1975). In the *Sierra Club* case a canal was to be built which would result in the damning of the river at the point where the canal would cross the river. The court adopted the reasoning of *Citizens Committee for the Hudson Valley* in applying the ordinary meaning of the words "dike" and "dam" and in finding that a structure covered by Section 9 was involved. The court noted:

> Such a closure of the Middle River will constitute the building of a "dike" within the meaning of Section 9. In *Citizens Committee for the Hudson Valley v. Volpe,* . . ., the court held that the word 'dike' should be defined in accordance with its ordinary meaning. The court found that dike meant, *inter alia,* '[a]n embankment for controlling or holding back the waters of the sea or a river.' . . . The Court notes that 'dam' is defined as "a barrier preventing the flow of water" . . . . Hence, even though the closure of Middle River will be caused by a structure denoted as a 'canal', because the structure will have the effect of a 'dam' or 'dike', the Court finds that the Peripheral Canal is the type of structure regulated by Section 9. Because the Peripheral Canal will clearly be 'in' the Middle River, the only issue remaining is whether Section 9 prohibits any dikes or only those dikes which obstruct navigation. Although the legislative intent underlying the enactment of Section 9 may well have been to prohibit unreasonable obstructions to navigable waters, it seems likely that Congress used the word 'any' in Section 9 in

> order to reserve the right to determine whether a given structure created an unreasonable obstruction. Because the Peripheral Canal will obstruct navigation on the Middle River, however, either construction of Section 9 will include the Canal within the section's regulatory prohibitions. (citations omitted) 400 F. Supp. at 626-627.

It would appear that the court in *Sierra Club* recognized the possibility that a two step process would have to be undertaken in a Section 9 inquiry: (1) does the structure fall within the ordinary definition to be given to the term "dam" or "dike", and (2) does this "dam" or "dike" obstruct navigation. The court found the consent of Congress was required because the court considered that either (1) the structure was a dam or dike, or (2) the structure was a dam or dike and was an obstruction to navigation. The court in *Sierra Club* did not make a finding as to whether the structure was an *unreasonable* obstruction to navigation, an inquiry the court thought the statute reserved to the Congress.

To summarize the three cases discussed above, *Citizens Committee for the Hudson Valley* found that Section 9 applies to any structure coming within the ordinary meaning of the word "dike" and left to Congress the determination of whether there was an obstruction to navigation, unreasonable or not. *Petterson* is an advisory view that Congressional consent is required only when a dike is an obstruction to navigation, while *Sierra Club* accepted the premise that the ordinary meaning should be given to the term "dike" and did not decide whether Section 9 applied to *any* dike or only those which constituted an obstruction to navigation, finding that either construction of Section 9 applied in that case as the structure contemplated was a dike and was an obstruction to navigation.

Two decisions of the Supreme Court support the court's view that Congress has specified the structures over which it retains control, that a dike is one such structure, and that the general purpose of Section 9 was to exercise control over obstructions to navigation, leaving to Congress the determination of which obstructions will be allowed and which prohibited. This determination is delegated to the Corps of Engineers as to cases enumerated in the second and third clauses of Section 10 but is reserved to the Congress as to those structures described in Section 9.

Thus, in *Wisconsin v. Illinois,* 278 U.S. 367 (1929), the court speaking through Chief Justice Taft stated:

> Congress, having stated in Section 9 as to what particular structures its specific consent should be required, intended to leave to the Secretary of War, acting on the recommendation of the Chief of Engineers, the determination of what should be approved and authorized in the class of cases described in the second and third clauses of Section 10. If the section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of the undertakings specifically provided for in the second and third clauses of Section 10 could safely be undertaken without a special authorization of Congress. We do not think this was intended. . .
>
> * * * *
>
> The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction.
>
> *Id.* at p. 412-413

In *United States v. Arizona,* 295 U.S. 174 (1935), the court dealing with Section 9 stated:

> Subject to an exception with which we have no concern, Sec. 9 of the Act of March 3, 1899 forbids the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river or other navigable water of the United States until the consent of Congress shall have been obtained and until the plans shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War. 33 U.S.C. Sec. 401. And Sec. 12 makes violations of Section 9 punishable by fine or imprisonment or both and provides for removal of unauthorized structures. 33 U.S.C. Sec. 406. These provisions unmistakably disclose definite intention on the part of Congress effectively to safeguard rivers and other navigable waters against the unauthorized erection therein of dams or other structures for any purpose whatsoever.
>
> *Id.* at p. 183-184

In the light of this review of cases construing the Act, the court in the present case concludes that it should first determine whether the proposed structure is a dike within the ordinary meaning of the term. If the structure is found to come within this meaning, the court should then consider whether the dike, if constructed, would constitute an obstruction to navigation. If the structure is found to be a dike which is an obstruction to navigation, it then becomes the exclusive province of the Congress to determine whether the obstruction is unreasonable and approval of the project should be denied, or whether the obstruction is reasonable and approval should be granted.

Is the Structure a Dike?

Citizens Committee for the Hudson Valley v. Volpe, 302 F.Supp. 1083 (S.D. N.Y. 1969) teaches that the word "dike" is to be given its ordinary meaning in construing Section 9. Dike is defined as "[a] bank, as of earth, thrown up to form a barrier, line of demarcation or the like * * *" Webster's New International Dictionary, 2nd Ed., p. 730 (1954), "An embankment for controlling or holding back the waters of the sea or a river." Random House Dictionary of the English Language, p. 403 (1967).

The State of Maryland in its application for a permit (A.R.D. 11)[3] stated "We request a permit for the construction of a diked disposal area for the dredged spoil to be built as shown on the attached plans in the Chesapeake Bay in the vicinity of Hart and Miller Islands." The permit finally issued on November 22, 1976 (Exhibit 1 to the Complaint) authorizes the State of Maryland to construct "a diked disposal area to contain dredged material on approximately 1,100 acres adjacent to Hart and Miller Islands" in accordance with attached plans and drawings titled "Proposed Dredging and Dike in Chesapeake Bay at Miller and Hart Island." The area plan attached to the permit notes that "4,300,000 cubic yards will be dredged from portions of cross-hatched area by hydraulic dredging and will be deposited around perimeter of disposal area to form the dike"; "during construction of the dike, the rip-rap will be placed in a timely manner to preclude erosion of the dike material"; "in order to shape the dike, dragline method may be used." The project description in the final environmental impact statement prepared by the U.S. Army Engineer District, Baltimore, Maryland refers to the structure as a dike throughout. The communications to and from the Corps of Engineers found in the administrative record with regard to the project are replete with

[3] "A.R.D." refers to Administrative Record Document.

references to the structure as a dike. Since the whole purpose of the structure is to hold back the waters of the bay from intrusion into the area in which the dredged spoil will be placed, the court is satisfied that the structure is a dike within the ordinary meaning of that term.

Is the Dike an Obstruction to Navigation?

The structure of Sections 9 and 10 of the Rivers and Harbors Act of 1899 is not simple. Justice Harlan has stated that their provisions are complex and their legislative history tortuous.[4] Curiously, the word "obstruction" appears only once, in the first clause of Section 10. It appears to the court that the first clause of Section 10 is a transitional clause, and applies not only to Section 10, but to Section 9.

This conclusion stems from a review of the principal clauses in the two sections.

First Section 9, 33 U.S.C. Section 401. makes it unlawful to construct any bridge, dam, dike, or causeway without the consent of Congress and the approval of the Chief of Engineers and the Secretary of War.

Second A bridge, dam, dike or causeway under Section 9 may be built under authority of a state legislature where the waterway involved lies wholly within the limits of the state, provided the location and plans are approved by the Chief of Engineers and the Secretary of War.

Third Clause 1 of Section 10, 33 U.S.C. § 403 provides "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any waters of the United States is hereby prohibited."

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[4] Dissenting in *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 493.

Fourth Clause 2 of Section 10 makes it unlawful to build any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structure except on plans recommended by the Chief of Engineers and authorized by the Secretary of War.

Fifth Clause 3 of Section 10 makes it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . the channel of any navigable water unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War.

What emerges from these clauses seems to be this:

1. Any obstruction to navigable capacity not authorized by Congress is prohibited.
2. Bridges, dams, dikes and causeways are obstructions to navigation where the consent of Congress is absolutely required if the navigable water extends through more than one state.
3. Congress has delegated its consent function in the case of a bridge, dam, dike or causeway obstructing a navigable water wholly within a single state to the Chief of Engineers and the Secretary of War if the concerned State has authorized it.
4. Congress has delegated its consent function as to any of the obstructions enumerated in Clauses 2 and 3 of Section 10 to the Chief of Engineers and the Secretary of War.

The Supreme Court has ruled that the "any obstruction" language of Section 10, Clause 1 is not limited either to the specific structures enumerated in Section 9 or to the specific structures listed in Clauses 2 and 3 of Section 10.

Justice Douglas in *United States v. Republic Steel Corp.*, 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903, rehearing denied, 363 U.S. 858, 80 S.Ct. 1605, 4 L.Ed.2d 1739, observed that the "any obstruction" language of Section 10 must be given a broad sweep, embracing not only the prior enumeration of obstructions in Section 9, the structures listed in Clauses 2 and 3 of Section 10, but also diminution of the navigable capacity of a waterway by means not included in any listing of structures in Section 9 or Section 10. In the *Republic* case, he held the concept of "obstruction" was therefore broad enough to encompass the discharge into a navigable river of industrial solids which reduce the depth of the channel.

In the present case, we are dealing with a massive structure two square miles in size in the Chesapeake Bay, a mile off the shore. It would eventually accommodate 52 million cubic yards of spoil. According to the environmental impact statement itself,[5] "it is undeniable that boating will be precluded in the space occupied by the containment area. On the Bay side boating will be moved further out into the Bay." The court finds that such a structure in the waters of the bay would be an obstruction to navigation. Whether or not it is an unreasonable obstruction is a matter that should be determined by the Congress under 33 U.S.C. § 401.

The Reach of the Statute

Defendants contend that 33 U.S.C. § 401 is limited in its application to those situations where a dam or dike is constructed *across* a navigable water of the United States, thereby creating an obstacle to navigation of the waterbody. 33 U.S.C. § 403 is said on the other hand to apply to all other structures to be constructed in navigable waters. From this it is argued that since Maryland's diked disposal facility, although called a "dike", does not extend

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[5] EIS, p. 90.

completely across the Chesapeake Bay, it therefore is subject to regulation under 33 U.S.C. § 403, rather than 33 U.S.C. § 401. Indeed, the Corps has been careful to announce this distinction in the latest regulations promulgated on July 19, 1977, after the filing of the present suit. Those regulations now define the term "dike" to mean:

> an embankment, low dividing wall, or other protective barrier that completely spans a navigable water of the United States and that may obstruct interstate waterborne commerce.
>
> 33 C.F.R. 321.2

It is said by defendant Corps that the new regulation merely crystalizes what has been a uniform administrative practice; namely, to treat structures which completely obstruct a waterway under Section 401 and all others under Section 403. It is urged further that where an agency has interpreted a statute which it has been charged to administer, the court should grant that agency's construction considerable deference.

As to these contentions, the court observes that water cannot rise higher than its source—in this instance neither administrative practice nor the promulgation of regulations can create jurisdiction where none exists. As the Supreme Court put it in *Federal Maritime Commission v. Sea Train Line,* 411 U.S. 726, 93 S.Ct. 1773, 36 L.Ed.2d, at 620:

> But the Commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. *See, e.g., N.L.R.B. v. Hearst Publications, Inc.,* 322 U.S. 111 (1944). This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate.
>
> *Id.* at 745.

In the present case, the newly promulgated definition of the term "dike" was not contained in the Corps' regulations at the time the Hart-Miller permit was being processed and issued. (33 C.F.R. 209.125, 1976 Ed.). The regulation cannot be definition expand the reach of the statute. The statute does not say the consent of Congress is required only when the bridge, dam or dike completely spans or completely obstructs a waterway. The statute in relevant part expressly states:

> It shall not be lawful to construct . . . any bridge, dam, dike or causeway over or *in* any . . . navigable water . . . until the consent of Congress to the building of such structures shall have been obtained. (Emphasis supplied)

The language is "over or in" any navigable water—not "completely spans."

It is significant that in the case which is closest to this case on its facts—*Citizens Committee for the Hudson Valley v. Volpe, supra*—the dike in issue there extended north along the east side of the Hudson River, containing fill to support a highway extension. It did not in any fashion "completely span" the Hudson River or completely obstruct waterborne commerce. The court found it unnecessary to consider the effect of the dike on navigation—a task reserved to the Congress under the statute. However, if such consideration were necessary, the court noted that the dike would affect the flow of the river by preventing erosion of the fill back to a natural shoreline (302 F.Supp. 1089). This same reasoning would be applicable to the Hart-Miller Dike, which involves over five times as much fill as the Hudson River Project.

The Corps argues that because there have been instances where it has interpreted the statute to give it control over dike structures which do not completely obstruct navigation, and Congress has not acted to reverse the Corps ac-

tion, Congress must be considered to have tacitly ratified the Corps' administrative interpretation of the statute. Disproving this argument is the fact that when necessary Congress has specifically exempted diked disposal areas from the application of Section 401, thus indicating either that Congress is not aware of or does not accept the Corps' interpretation of Section 401. In this connection, reference is made to the Rivers and Harbors Act of 1970, Public Law 91-611, December 31, 1970, wherein the Congress, in a section of the Act dealing only with the Great Lakes and their connecting channels, specifically provided:

> Sec. 123(a) The Secretary of the Army, acting through the Chief of Engineers, is authorized to construct, operate, and maintain, subject to the provisions of subsection (c), contained spoil disposal facilities of sufficient capacity for a period not to exceed ten years, to meet the requirements of this section. Before establishing each such facility, the Secretary of the Army shall obtain the concurrence of appropriate local governments and shall consider the views and recommendations of the Administrator of the Environmental Protection Agency and shall comply with requirements of Section 21 of the Federal Water Pollution Control Act, and of the National Environmental Policy Act of 1969. *Section 9 of the River and Harbor Act of 1899 shall not apply to any facility authorized by this section.*

Here is a clear indication of Congress specifically waiving its prerogative under 33 U.S.C. § 401 to approve the very type of facility involved in the present case. If, as the Corps contends, the Congress had tacitly ratified the administrative interpretation argued for in the present case, there would have been no need to spell out a specific exemption in the Rivers and Harbors Act of 1970, Public Law 91-611. It is to be noted Public Law 91-611 is the same Act cited by the Corps as authorizing funds to deepen

Baltimore Harbor and its access channels to a depth of 50 feet, conditioned upon the requirement that the State of Maryland provide disposal sites for the dredged spoil.

Conclusion

While the court is keenly aware of the problems associated with open water dumping of dredge spoil, and of the need to deepen Baltimore Harbor and its access channels, the statute mandates Congressional approval of the project before it can be undertaken. The court, therefore, holds that in issuing a permit to the State of Maryland under 33 U.S.C. § 403, the Corps of Engineers exceeded its authority. On the one issue dealt with here—the legality *vel non* of the permit to construct the diked dredge spoil containment area at Hart and Miller Islands—the court hereby grants the plaintiff's motion for summary judgment and denies the motions for summary judgment filed by the defendants. The court expresses no view on the other issues raised in the cross motions for summary judgment.

/s/ Herbert L. Murray
United States District Judge

Filed October 20, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM77-973

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., et al.

v.

THE CORPS OF ENGINEERS OF THE UNITED STATES, et al.

MEMORANDUM AND ORDER

On October 20, 1978 the court issued a memorandum and order in this case which granted the plaintiffs' motion for summary judgment and denied the defendants' motions for summary judgment. The court after careful consideration of the substantial number of documents, memoranda and other materials submitted in this case, as well as the arguments of counsel, determined that the Corps of Engineers had exceeded its authority in issuing a permit to the State of Maryland for the construction of a diked disposal area in the Chesapeake Bay.

Subsequent to the announcement of the court's decision, the Steamship Trade Association of Baltimore, Inc., an intervening defendant, filed a motion to alter judgment and/or for reconsideration and for rehearing, and the State of Maryland, a defendant, filed a motion for clarification, reconsideration and reargument in which the Corps of Engineers of the United States, also a defendant, joined.

In connection with these motions, referred to in this opinion as motions for reconsideration, the court has again received several memoranda and the parties have directed the court's attention to a variety of supplementary materials. A hearing on the motions for reconsideration was held on November 17, 1978, and after giving considerable thought to the materials submitted in connection with those motions and to the comments of counsel pertaining thereto,

it is the opinion of the court that the defendants' motions must be denied.

The defendants have raised a number of objections to the decision of the court granting plaintiffs' motion for summary judgment. Many of those objections can be categorized as continuing attempts to pursue matters which previously have been fully litigated and were thoroughly considered by the court in reaching its original determination. Foremost among the arguments upon which the defendants continue to rely is the vigorously asserted proposition that the decision of the court should be controlled by the Corps of Engineers' interpretation of Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, as reflected in the practice of the Corps and in statements of Corps officials.

The argument that courts should defer to administrative construction of a statute is frequently made in cases involving activities of government agencies or administrators. Where the mandate of the statute is clearly contrary to its administrative interpretation, it is the duty of the court to reject that interpretation. *S.E.C. v. Sloan,* 436 U.S. 103, —— L.Ed. —— (May 16, 1978); *Adamo Wrecking Co. v. U.S.,* 434 U.S. 275, —— L.Ed. —— (Jan. 10, 1978).

Before the Supreme Court in the case of *S.E.C. v. Sloan, supra,* was a longstanding agency interpretation of Section 12(k) of the Securities and Exchange Act of 1934. Although the Corps' allegation that its interpretation of Section 9 of the Rivers and Harbors Act of 1899 is longstanding is not altogether clear to the court in light of the promulgation of regulations in 1977 limiting the structures governed by Section 9 to those structures which go "across" waterways, 33 C.F.R. 321.2, the following language from the Supreme Court opinion in *Sloan* is instructive:

> Nor does the existence of a prior administrative practice, even a well-explained one, relieve us of our re-

sponsibility to determine whether that practice is consistent with the agency's statutory authority.

> 'The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law." *NLRB v. Hearst Publications,* 322 U.S. 111, 131; *Unemployment Commission v. Aragon,* 329 U.S. 143, 153-154. But the courts are the final authorities on issues of statutory construction, *FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 385, and "are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown,* 380 U.S. 278, 291.' *Volkswagenwerk v. Federal Maritime Comm'n,* 390 U.S. 261, 292 (1968).

And this is just such a case—the construction placed on the statute by the Commission, though of long-standing, is, for the reasons given in Part III-A of this opinion, inconsistent with the statutory mandate. We explicitly contemplated just this situation in *Federal Maritime Comm'n v. Seatrain Lines, Inc.,* 411 U.S. 726, 745-746 (1973), where we said:

> 'But the Commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. . . . This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate.'

And our clear duty in such a situation is to reject the administrative interpretation of the statute. 436 U.S. at 118, 119.

Section 9 of the Act requires congressional consent for the construction of certain structures "over or in" specified waterways or "other navigable water of the United States." 33 U.S.C. § 401. The Corps contends that it has uniformly interpreted Section 9 to apply only to those structures which completely span or go across a waterway. That interpretation of Section 9, which defendants urge the court to adopt, differs significantly from the actual language of the statute and would read the word "in" out of the Act. When the Congress said construction of "any dike" "over or in" any navigable water is prohibited until the consent of Congress to the building of such structure shall have been obtained, it meant exactly what it said. For that reason, the Corps of Engineers' interpretation of Section 9 of the Rivers and Harbors Act of 1899 was and remains rejected by the court. *Compare Citizens Committee for the Hudson Valley v. Volpe*, 302 F.Supp. 1083 (S.D. N.Y. 1969), *affirmed*, 425 F.2d 97 (2d Cir. 1970) (Determining a diked fill built along the bank of the Hudson River to be "in" the river); *with Petterson v. Resor*, 331 F. Supp. 1302 (D. Ore. 1971), *remanded and vacated as moot*, 494 F.2d 124 (9th Cir. 1974), (Drawing no distinction between structures "in" and those "across" waterways); and *Sierra Club v. Morton*, 400 F.Supp. 610 (N.D. Calif. 1975) (Characterizing the project involved as "in" the particular waterway under consideration).

Given the frequent attention which Congress has devoted to the Rivers and Harbors Act of 1899, reflected by at least eleven separate public laws enacted in the past twenty-two years either amending the Act or containing authorizations under it, it is apparent that Congress is not unaware of either the Act or its specific provisions. In Section 123 of the legislation authorizing the Baltimore Harbor and Channels, Maryland-Virginia Project, the project which has occasioned the efforts of the Corps of Engineers at issue in this case, P.L. 91-611, enacted Dec. 31, 1970, Congress specifically exempts contained spoil disposal facilities in the

Great Lakes from Section 9 of the Rivers and Harbors Act of 1899. 84 *Statutes at Large* at 1823 (1971). The fact that Congress felt compelled to specifically exempt those facilities indicates that Congress either is not cognizant of or does not accept the Corps' interpretation of Section 9 which limits it to structures "across" a waterway. The court has not been advised of a similar exemption applicable to the Hart and Miller Islands facility; and, it most certainly is not the function of the court either to create such an exemption or to rewrite the statute.

The defendants have directed the attention of the court to the case of *Citizens Committee for Environmental Protection, et al. v. U.S. Coast Guard, et al.*, 456 F.Supp. 101 (1978), a recent decision by Chief Judge Barlow of the United States District Court for the District of New Jersey. It is suggested by the defendants that the New Jersey case merits a reconsideration by this court of its decision to grant plaintiff's motion for summary judgment. Without taking issue with the decision of Chief Judge Barlow, concerning a project which appears to differ significantly from the one involved in this litigation, the court notes that Chief Judge Barlow principally relied on the case of *Petterson v. Resor,* 331 F.Supp. 1302 (D. Ore. 1971) *remanded and vacated as moot,* 494 F.2d 124 (9th Cir. 1974), and for reasons contained in its memorandum and order, this court views that case as a decision which is entitled to advisory weight only on the issues presented here.

The defendants have persistently reminded the court that the permit, which the court has determined was issued improperly, was obtained under both 33 U.S.C. § 403, governing construction work in navigable waters of the United States, and 33 U.S.C. § 1344, governing the discharge of fill in those waters. The court has encountered considerable difficulty in attempting to ascertain the significance attached to that fact by the defendants. It has not been

asserted that the issuance of a permit under 33 U.S.C. § 1344 obviates the need for a permit under 33 U.S.C. § 401. The futility of such a claim is exposed when consideration is given to the facts that the two provisions apply to completely different, though potentially related, activities and nothing in the wording of 33 U.S.C. § 1344 or its legislative history can be read to indicate that compliance with 33 U.S.C. § 401 is not required or that § 401 has been repealed by implication.

The court is, as stated in its previous ruling, keenly aware of the problems associated with open water dumping and of the need to deepen Baltimore Harbor and its access channels. Yet that awareness does not and cannot relieve the defendants of the requirement, mandated by statute, of congressional consent to the Hart and Miller Islands diked disposal project. It is entirely consistent with the idea behind our form of government that the final decision as to whether a major structure in a navigable waterway running through two or more states constitutes an unreasonable obstruction should be reserved for the elected representatives of the people rather than be determined by an administrative agency.

For the reasons previously stated, the information and arguments presented by defendants in support of their motions to reconsider do not justify either an alteration of the court's decision granting the plaintiffs' motion for summary judgment or any other form of post judgment relief. Therefore, it is this 22nd day of November, 1978, by the United States District Court for the District of Maryland,

ORDERED:

that the motions for reconsideration be, and the same hereby are, *Denied.*

/s/ HERBERT L. MURRAY
United States District Judge

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1911

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., a Maryland Corporation; HONORABLE CLARENCE LONG, M.C.; HONORABLE NORMAN R. STONE; MARYLAND WILDLIFE FEDERATION, INC., a Maryland Corporation; JOHN HENDERSON; HOWARD SAPPINGTON; GEORGE WOHLLEBEN; ROBERT SCOTT; MARGARET CALDWELL; CHARLES JUSTICE,

Appellees,

v.

THE CORPS OF ENGINEERS OF THE UNITED STATES ARMY; HONORABLE CLIFFORD L. ALEXANDER, Secretary of the Army; LT. GENERAL JOHN W. MORRIS, Chief of Engineers of the United States Army; COL. G. K. WITHERS, District Engineer, Baltimore District, United States Army Corps of Engineers,

Defendants,

and

STATE OF MARYLAND, Ex Rel,
FRANCIS B. BURCH, Attorney General,

Appellant,

and

STEAMSHIP TRADE ASSOCIATION OF BALTIMORE, INC.,

Intervening Defendant,

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

FILED MAY 28, 1980

U.S. COURT OF APPEAL, FOURTH CIRCUIT

/s/ WILLIAM K. SLATE
Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1912

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., a Maryland Corporation; HONORABLE CLARENCE LONG, M.C.; HONORABLE NORMAN R. STONE; MARYLAND WILDLIFE FEDERATION, INC., a Maryland Corporation; JOHN HENDERSON; HOWARD SAPPINGTON; GEORGE WOHLLEBEN; ROBERT SCOTT; MARGARET CALDWELL; CHARLES JUSTICE,

Appellees

v.

THE CORPS OF ENGINEERS OF THE UNITED STATES ARMY; HONORABLE CLIFFORD L. ALEXANDER, Secretary of the Army; LT. GENERAL JOHN W. MORRIS, Chief of Engineers of the United States Army; COL. G. K. WITHERS, District Engineer, Baltimore District, United States Army Corps of Engineers,

Defendants

and

STATE OF MARYLAND, Ex Rel,
FRANCIS B. BURCH, Attorney General,

Intervening Defendant

and

STEAMSHIP TRADE ASSOCIATION OF BALTIMORE, INC.,

Appellant

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

FILED MAY 28, 1980

U.S. COURT OF APPEAL, FOURTH CIRCUIT

/s/ WILLIAM K. SLATE, II
Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1037

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., a Maryland Corporation; HONORABLE CLARENCE LONG, M.C.; HONORABLE NORMAN R. STONE; MARYLAND WILDLIFE FEDERATION, INC., a Maryland Corporation; JOHN HENDERSON; HOWARD SAPPINGTON; GEORGE WOHLLEBEN; ROBERT SCOTT; MARGARET CALDWELL; CHARLES JUSTICE,

Appellees

v.

THE CORPS OF ENGINEERS OF THE UNITED STATES ARMY; HONORABLE CLIFFORD L. ALEXANDER, Secretary of the Army; LT. GENERAL JOHN W. MORRIS, Chief of Engineers of the United States Army; COL. G. K. WITHERS, District Engineer, Baltimore District, United States Army Corps of Engineers,

Appellants

and

STATE OF MARYLAND, EX REL, FRANCIS B. BURCH, Attorney General, Steamship Trade Association of Baltimore, Inc.,

Intervening Defendant

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this case, be, and the same is hereby, reversed.

FILED MAY 28, 1980

U.S. COURT OF APPEAL, FOURTH CIRCUIT

/s/ WILLIAM K. SLATE, II
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM77-973

HART AND MILLER ISLANDS AREA
ENVIRONMENTAL GROUP, INC., et al.

v.

THE CORPS OF ENGINEERS OF
THE UNITED STATES, et al.

ORDER

The court having determined for the reasons set forth in its opinion filed in this case on October 20, 1978 that the Corps of Engineers exceeded its authority in issuing on November 22, 1976 a permit to the State of Maryland to construct a diked dredge spoil containment area at Hart and Miller Islands in the Chesapeake Bay without having first obtained the consent of Congress to the building of such structure as required by Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. Sec. 401, the court having therefore found said permit to be void and of no effect; the court hereby expressly determines that there is no just reason for delay and expressly directs that judgment be entered pursuant to Rule 54(b) on fewer than all of the claims of the plaintiffs; now therefore it is this 24th day of October, 1978, by the United States District Court for the District of Maryland,

ORDERED:

(1) that the motion of plaintiffs for summary judgment be, and the same hereby is, *Granted* as to Count One of the Complaint;

(2) that the motions of defendants for summary judgment be, and the same hereby are, *Denied* as to Count One of the Complaint;

(3) the court at this time expresses no view as to the points raised in the motions for summary judgment as to Counts Two through Eleven of the Complaint; and

(4) that the Clerk of the Court mail copies of this Order to counsel for the parties.

/s/ HERBERT L. MURRAY
United States District Judge

STATUTES

SECTION 2 OF THE RIVERS AND HARBORS ACT OF 1888 (25 Stat. 423; 33 U.S.C. § 500)

That whenever complaint shall be made to the Secretary of War that by reason of the placing in any navigable waters of the United States of any bridge pier or abutment, the current of such waters has been so deflected from its natural course as to cause by producing caving of banks or otherwise serious damage or danger to property, it shall be his duty to make inquiry, and if it shall be ascertained that the complaint is well founded, he shall cause the owners or persons operating such bridge to repair such damage or prevent such danger to property by such means as he shall indicate and within such time as he may name, and in default thereof the owners or persons operating such bridge shall be liable in any court of competent jurisdiction to the persons injured in a sum double the amount of said injury: *Provided, however,* That nothing herein contained shall be construed so as to affect any rights of action which may exist at the time of the passage of this act.

SECTION 4 OF THE RIVERS AND HARBORS ACT OF 1890 (26 Stat. 453)

That section nine of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed over any of the navigable water-ways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw-opening or the draw-span of such bridge by rafts, steam boats, or other watercraft, it shall be the duty of the said

Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken.

SECTION 5 OF THE RIVERS AND HARBORS ACT OF 1890 (25 Stat. 453)

That section ten of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

That if the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect as hereinbefore required from the Secretary of War and within the time prescribed by him, willfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises such persons, corporation or association shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed.

SECTION 7 OF THE RIVERS AND HARBORS ACT OF 1890 (25 Stat. 454)

That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor-lines, or in any navigable waters of the United States where no harbor-lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided,* That this section shall not apply to any bridge, bridge-draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State.

SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1890 (25 Stat. 454)

That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters,

in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

SECTION 6 OF THE RIVERS AND HARBORS ACT OF 1894 (27 Stat. 363)

That it shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the waters of any harbor or river of the United States, for the improvement of which money has been appropriated by Congress, elsewhere than within the limits defined and permitted by the Secretary of War; neither shall it be lawful for any person or persons to move, destroy, or injure in any manner whatever any sea wall, bulkhead,

jetty, dike, levee, wharf, pier, or other work built by the United States, in whole or in part, for the preservation and improvement of any of its navigable waters, or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks; any and every such act is made a misdemeanor, and every person knowingly engaged in or who shall knowingly aid, abet, authorize, or instigate a violation of this section shall, upon conviction, be punishable by fine or imprisonment, or both, such fine to be not less than two hundred and fifty dollars nor more than twenty-five hundred dollars, and the imprisonment to be not less than thirty days nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction of this misdemeanor.

SECTION 9 OF THE RIVERS AND HARBORS ACT OF 1899 (30 Stat. 1151; 33 U.S.C. § 401)

That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after comple-

tion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899 (30 Stat. 1151; 33 U.S.C. § 403)

That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

SECTION 18 OF THE RIVERS AND HARBORS ACT OF 1899 (30 Stat. 1153; 33 U.S.C. § 502)

That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steam-

boats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: *Provided,* That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants.